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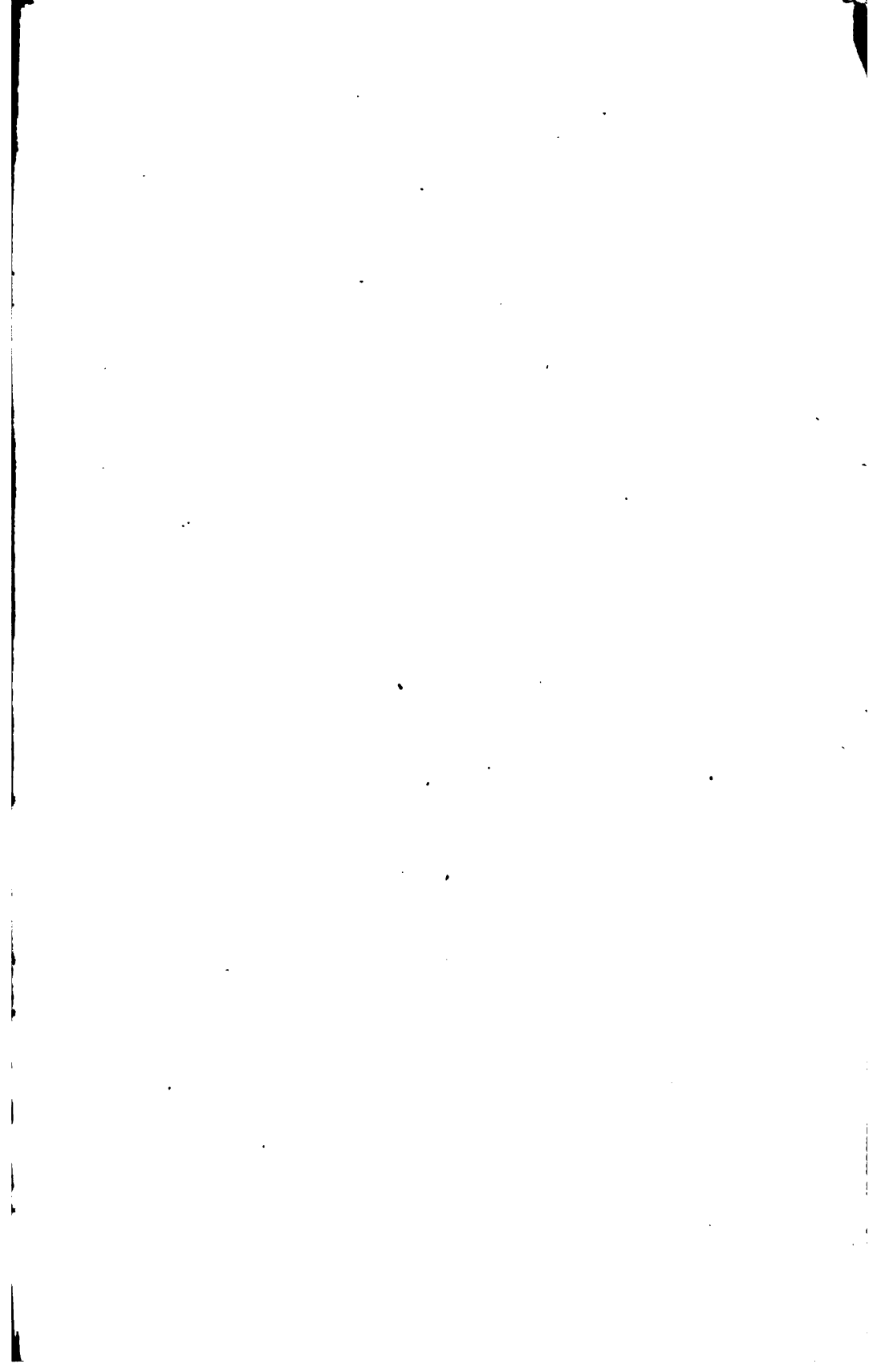


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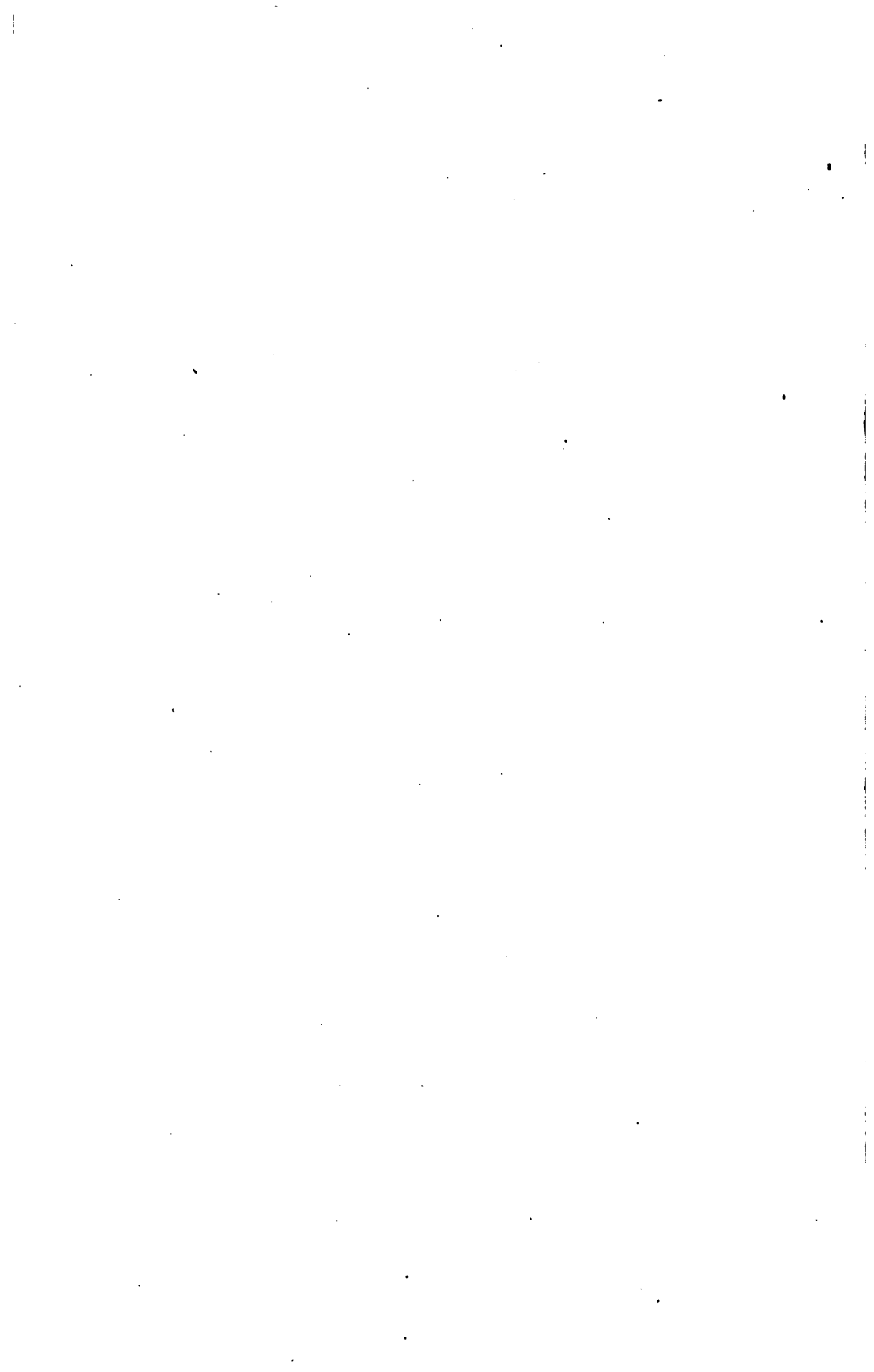
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LOUISIANA

Annual Reports.



Jan 2

REPORTS

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OF

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IN THE

SUPREME COURT

OF

LOUISIANA.

VOL. 40—FOR THE YEAR 1888.

HENRY DENIS,

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1888.

Rec. May 9, 1889.

JUDGES OF THE SUPREME COURT,

DURING THE TERM OF THESE REPORTS.

CHIEF JUSTICE:

EDWARD BERMUDEZ, LL. D.

ASSOCIATES:

FELIX P. POCHÉ,
CHARLES E. FENNER,
LYNN B. WATKINS,
*SAMUEL D. MCENERY.

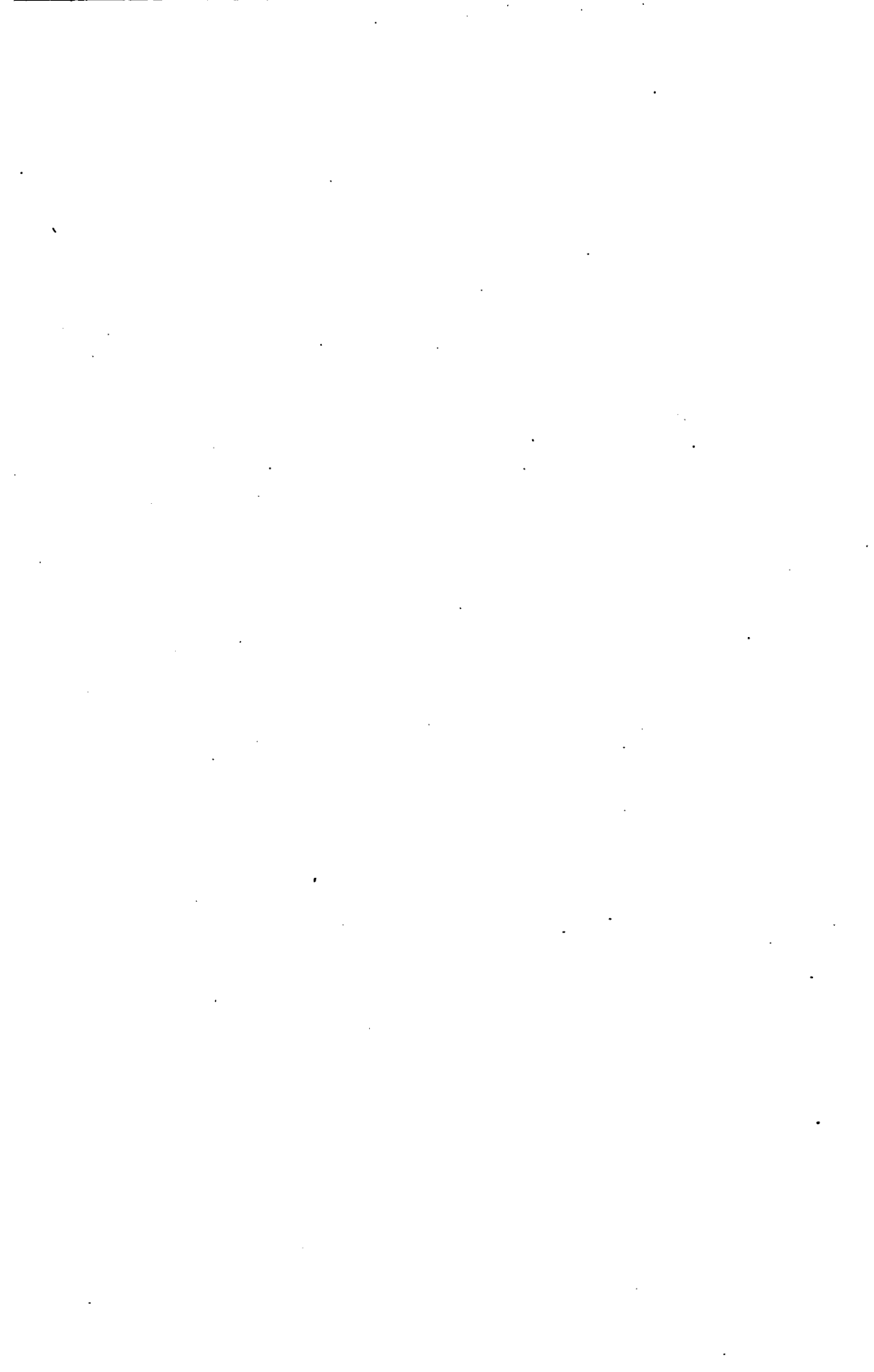
ATTORNEY GENERAL:

WALTER H. ROGERS.

CLERKS OF THE COURT:

JOSEPH F. POCHÉ, New Orleans.
ROBERT J. WILLSON, Monroe.
B. F. MEGUINLEY, Opelousas.
W. G. BONEY, Shreveport.

*Appointed on 11th June, 1888.



IN MEMORIAM

—OF—

Morrison R. Waite, Chief Justice of the United States.

SUPREME COURT OF LOUISIANA,
NEW ORLEANS, April 2, 1889.

The Court was duly opened. Present, their Honors, Edward Bermudez, Chief Justice; and Felix P. Poché, Charles E. Fenner, Lynn B. Watkins, Samuel D. McEuery, Associate Justices.

When Hon. Thomas J. Semmes rose and paid a most eloquent and touching tribute to the memory of the departed Chief Justice. The death of CHIEF JUSTICE WAITE was no ordinary one, when it was considered that but six people have occupied that high office during 100 years.

The speaker reviewed the life of the dead Chief Justice and eulogized his sterling qualities of heart and mind and his great ability to distinguish between the right and wrong. Southerners who went to Washington and appeared at the bar of the Supreme Court found in the Chief Justice a signally polite, courteous and friendly judge. In conclusion, Mr. Semmes hoped that the present Administration, in looking around for Mr. Waite's successor, might find a man equally fit to succeed him.

Hon. Carleton Hunt then arose to second the motion to adjourn. The speaker referred to the deceased as a typical American judge, even minded, right thinking, well balanced, conservative and patriotic. He was the kindest, most gentle, most unaffected, most informal and most dignified judge one could imagine.

Mr. Henry C. Miller, in a masterly address, referred to the decisions of the Chief Justice as a proof of his talent as a lawyer, his justice as a magistrate, and his worth as a man.

Judge J. S. Whitaker, one of the oldest members of the bar, joined in the eulogistic testimonials which had been spoken.

Chief Justice Bermudez, responding for the Court, said:

It is eminently proper when a public functionary has signalized himself in the discharge of his duties and departs from among his fellow-men that a tribute of respect be paid to his memory, and that his achievements be announced for transmission to posterity. Partic-

ularly ought this to be the case when the functionary was the head and representative of one of the branches, perhaps the most important, of the government of a great country, and has responded to the trust and confidence relied in him by his fellow-citizens.

It is an observable incident in the history of the highest court in the land, that it is not until some eight months after the death of Chief Justice Chase, in May, 1873, that the vacancy thus created was filled by President Grant. This was done only in January following, the seat remaining unoccupied until March ensuing.

Surely the delay was not occasioned by the scarcity of able men and of aspirants, for there were not few. It is attributable to the almost insurmountable difficulty encountered in selecting one answering the exigencies of the difficult days capable of piloting safely amid the rocks and rapids through which the Republic was then struggling to pass and of securing the endorsement of the confirming power.

Such men as Conkling, Williams and Cushing, who were then deemed competent, met with such irresistible opposition that the thought of pressing either had to be abandoned and the name had to be withdrawn.

In spite of the secrecy cloaking the proceedings of the confirming authority it has transpired that when the name of the great public servant and excellent citizen, whose loss we mourn, was sent for consideration, a senator of incalculable influence argued in disparagement of him for a considerable time; but the character and worth of him whom he had so strenuously attacked, stood so high that when he closed his remarks not one of the sixty-odd other senators present undertook to answer, and that when the vote was taken it resulted in the affirmative without any exception, the opposing senator not participating either way.

The delay which elapsed between the appointment and induction into office was absorbed by the study which the new Chief Justice had to make of the rules and machinery of the court, as never before had he occupied a judicial position of that court, he showed himself an excellent administrator.

The reports of the United States Supreme Court will remain eternal witnesses, bearing testimony that during the fourteen years which elapsed since his assumption of his exalted position he has proved himself remarkably diligent and industrious, so much so that overwork impaired his health, shattered his robust constitution and shortened his earthly career.

His perfect rectitude, his extensive and solid learning, the soundness and breadth of his intellect, his superior sense and judgment, his

refined sagacity, his unbending impartiality, his stern devotion to duty, his unassumed modesty, his indomitable independence, his fearless energy, his untiring forbearance and indiscriminating urbanity, his thorough knowledge of men and things, his spirit of conversation, his magnanimity, in a word, his incontestable wisdom, have made him one of the most conspicuous figures in the country. He enjoyed the confidence and esteem of his associates and the whole bar.

It may very appropriately be said of Chief Justice Waite that in the fulfillment of his official duties he made no distinction of persons. Neither the rich nor the poor, the powerful nor the weak, the high nor the low, weighed heavier or lighter than the law authorized in the scales of justice which his hand regulated. All were treated alike, according to their merits or demerits. In his mind no section of the country was entitled over another to any preference owing to its geographical position or to the political color of its inhabitants.

He knew no rules in the administration of justice save those indelibly engraved in the organic or paramount law which he had sworn to support and in the domestic or international legislation passed, or jurisprudence announced in accord therewith. He was as jealous of the rights of the distinct sovereignties which compose the Union, as he was of the predominant prerogatives of the Union itself.

His motto seems to have been : *Fais ce que dois, advienne que pourra.*

Alas ! the fatal hour of his departure finally struck ! The chair which he had so creditably filled to the very last moment of his official career is once more vacant and is now draped in solemn mourning !

The entire country, the mass of the people, citizens and aliens, the bench and the bar, the legislative and executive departments, State and Federal, all unite in proclaiming, with one voice and unfeigned deep regret, that the nation has sustained a heavy loss and that the name of the lamented deceased will be transmitted to posterity as that of a great and virtuous man, of an illustrious citizen, of an excellent public servant, a most worthy member of the august tribunal once adorned by the luminous Marshall and the immortal Taney.

Honor to his memory and peace to his ashes !

The Court stands adjourned without transacting any business, and the matters fixed for this day are continued to to-morrow.



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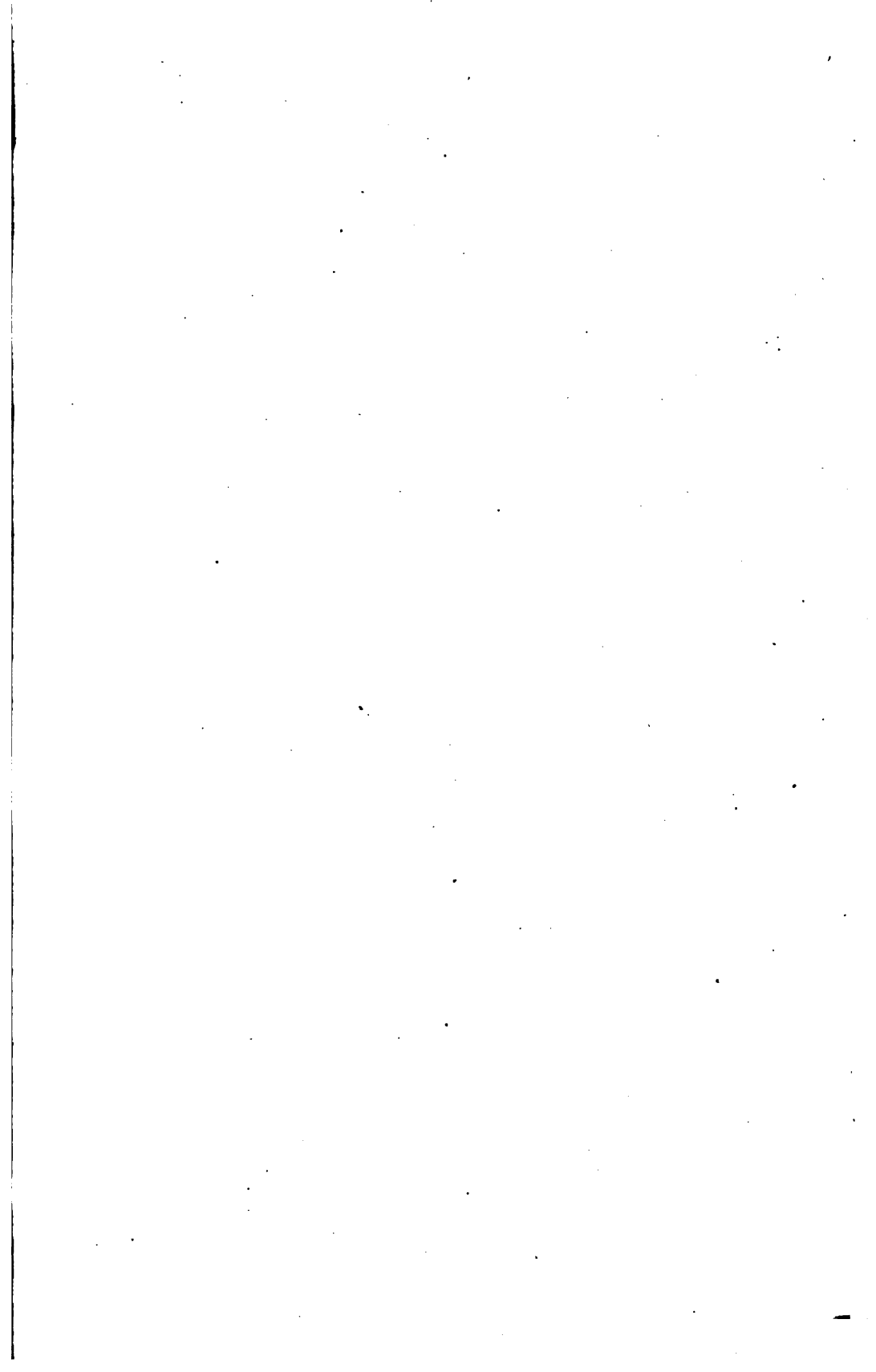
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CASES
 ARGUED AND DETERMINED IN THE
SUPREME COURT OF LOUISIANA,
 AT NEW ORLEANS.
 IN
JANUARY, 1888.

JUDGES OF THE COURT:

HON. EDWARD BERMUDEZ, *Chief Justice.*

Hon. FÉLIX P. POCHÉ,
 Hon. ROBERT B. TODD,
 Hon. CHARLES E. FENNER,
 Hon. LYNN B. WATKINS,

}

Associate Justices.

No. 10,092.

THE STATE EX REL. JAMES SWEENEY VS. ALBERT VOORHIES, JUDGE,
ETC., ET ALS.

A District Court has no jurisdiction over a cause, the object of which is to have it determined that claims, to enforce which suits are apprehended to be brought before a city court in unappealable amounts, have been paid or settled.

As a corollary, such court has no right to issue an injunction to prevent the creditor from instituting such suits.

It will be time enough to urge the plea of payment when the claims are put in suit. It is not to be presumed that if the same is established, the city judge will not maintain it or will violate the law and his official oath. 39 Ann. 619 affirmed.

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45	535
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4116	683

State ex rel. Sweeney vs. Judge et al.

While under Article 90 of the Constitution this court would be impotent to overturn an illegal judgment overruling the defense of payment, it could, under proper charges and proof, afford adequate relief under Article 200 of the same Constitution.

APPPLICATION for Certiorari and Prohibition.

T. M. Gill, for the Relator.

W. S. Benedict, contra.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is an application for a Prohibition.

The relator complains that, in a case over which he has no jurisdiction, the district judge has issued an injunction, forbidding him from bringing suits before a city court against certain parties named.

The relator states substantially that the ground upon which the injunction was allowed is, that the plaintiffs fear that the defendant (who is the relator here) will sue them before said court on items of alleged indebtedness, reduced to unappealable amounts, while the aggregate of the same exceeds the lower limit of the jurisdiction of this Court; that the amounts which he apprehends may thus be put in suit have been paid or settled, and that the object of the defendant (relator) in said future or eventual suits is to recover twice his claims and to vex and harass them.

The defendant in the injunction proceeding filed an exception to the jurisdiction of the district court, over the subject matter; but the same was overruled.

The defendant now appears before this Court and invokes its supervisory powers to declare that said district court has no jurisdiction in the premises.

In his return the district judge answers that he has jurisdiction of the main demand and that he has authority to maintain it.

At first sight it is apparent that the district court has no power to decide that which another court of undoubted jurisdiction would have the exclusive right of determining on a proper issue.

Were it otherwise, a clash of jurisdiction might arise to which no remedy could be applied. Such discordance and conflict in the judicial department must by all legal means be avoided.

If it be true that the plaintiffs in the injunction case have already paid or settled for the items of indebtedness which they say they fear the defendant in the suit proposes to sue them for before the city court, and if the defendant in the suit actually brings the apprehended suits, it will be time enough for the defendants in the same to plead and

State ex rel. Rice vs. Sheriff.

show *payment*. It is not to be presumed that, if such be the case, the city judge will violate the law and his official oath and overrule the plea of payment and condemn the parties to pay again.

Were he to do so, this Court would have no jurisdiction to reverse his judgments under any remedial writs justified by Article 90 of the Constitution; but it surely would have jurisdiction on proper averments and proof, to prevent the further abuse of power by any inferior judge, under the provisions of Article 200 of the Constitution.

This application, although somewhat differently garbed, presents the same question as was submitted and determined in the germane case of *State ex rel. Sweeney vs. Rightor*, Judge, 39 Ann. 619, in which it was held that the Constitution guarantees to every person the right to seek redress through the courts for any injury to his person or property, and to enforce any legal demand therein; and so, that a court is without power to prevent by an injunction a person from bringing a suit before another court of competent jurisdiction to enforce a right claimed, or redress an alleged grievance.

This controversy presents no feature which removes it beyond the compass of that ruling.

It is therefore ordered that a peremptory Prohibition issue herein as prayed for and according to law.

No. 10,099.

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THE STATE EX REL., GEORGE B. RICE VS. CHARLES A. BUTLER, CRIMINAL SHERIFF.

A person indicted for a capital offense is not entitled to bail on the ground that his case has been continued at the instance of the State, if it appears that the only effect of such continuance is to postpone the trial to the next month after the date for which the trial had been fixed.

An indictment for a capital offense affords sufficient presumption of the guilt of the accused, to remove him from the right to bail under the provisions of Article 9 of the Constitution.

A PPLICATION for Habeas Corpus.

John J. Finney for the Relator.

The opinion of the Court was delivered by

POCHÉ, J. This is an application by means of the writ of *habeas corpus*, to be admitted to bail by the relator who is held in custody under an indictment for arson, and who complains that he has been

State ex rel. Rice vs. Sheriff.

denied his constitutional right to a speedy trial through the fault of the State.

The record shows that the indictment against him was returned into court on the 22d of November, 1887, and that the trial of his case was fixed for the 20th of December following.

On that day relator, the accused, was in court ready for trial, but the State was not ready, and on motion a continuance was ordered.

The motion for a continuance was grounded on the absence of the district attorney from the city, and on other dilatory reasons, which were considered as satisfactory by the trial judge. Relator then applied to the district judge to be admitted to bail for the same reasons substantially which ground his present application to this court, and his motion was overruled.

His point is that a continuance of his trial at the instance of the State entitles him to bail, although the crime for which he stands indicted is not a bailable offense, under the Constitution.

Under the provisions of section 841 of the Revised Statutes, the crime of arson as charged against relator is punished by death, hence it is a capital offense.

Now Article 9 of the State Constitution, which secures the benefit of bail in criminal prosecutions provides that: "All persons shall be bailable by sufficient sureties, unless for capital offenses where the proof is evident or the presumption great."

Criminal jurisprudence has long since settled the rule that an indictment furnishes absolute evidence that the proof is evident and the presumption great as regards the right to bail. *Territory vs. Benoit*, 1 Martin, 142; *State vs. Merrick*, judge, 10 Ann., 424; *State ex rel., Hunter vs. Sheriff*, 35 Ann., 605. *Church on Habeas Corpus* §403, and authorities cited in note. Hence it follows that under the general rule relator is not entitled to bail.

But his contention is that, under the circumstances of his case, he comes under an exception to the general rule, and he rests his application on the following dictum in *McFarlane's case*, 1 Martin 416: "In case of a mistrial or of a continuance, at the instance of the territory, as the confinement may be extended to a considerable length, there would be no impropriety in listening to a motion to bail."

But relator's application does not present the exceptional circumstances contemplated in that decision, and nothing here suggests the probability, under the effect of the continuance, of a confinement to a considerable length.

In his petition relator himself avers that the only effect of the con-

State vs. Joseph.

tinuance will be to hold him in custody, "denied the privilege of a trial until sometime in the coming month," which begins to-morrow; and we are informed by the district attorney that the case will be fixed for trial for Friday next, the sixth day of that month.

The terms of the criminal district court of the parish of Orleans succeed each other every month, and everything points to a rapidly approaching trial of relator under the charge which is pending against him.

Hence his case under the present application presents no reasons to warrant the interference of this court at the present stage of the proceedings. Nothing in this application suggests any features to distinguish this case from that of Hunter in the 35th Ann., 605, in which a similar application was denied, after a thorough review of our own, and general, criminal jurisprudence.

It is therefore ordered that the writ is discharged at the relator's costs.

No. 10,084.

THE STATE OF LOUISIANA vs. CHRISTOVAL JOSEPH.

An appeal in a criminal case will not be dismissed where the transcript is filed within three days after the return day.

To admit proof of a cause or causes suspending prescription pleaded in bar of the prosecution, such cause or causes must be averred in the indictment.

Where a party is prosecuted under an indictment for murder and convicted of manslaughter and the judgment is arrested because on the face of the indictment a prosecution for manslaughter is barred by prescription, the case cannot be remanded to enable the prosecuting officer to amend the indictment by averring facts showing a suspension of prescription.

And where it appears that the accused is protected by prescription from prosecution under a new indictment for manslaughter, the prosecution must terminate and the accused be discharged.

When a party has been indicted for murder and convicted of manslaughter, he stands acquitted of murder and can never be tried again for that offense.

A PPEAL from the Thirteenth District Court, Parish of St. Landry.
Estilette, J.

M. J. Cunningham, Attorney General, and *John M. Ogden*, District Attorney, for the State, Appellant.

1. An appeal in a criminal case filed within three judicial days after the expiration of the ten days allowed by law, will not be dismissed. *State vs. Francis*, 38 Ann. 464.
2. When a conviction of manslaughter is had upon an indictment for murder and judgment

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44	972
44	1016

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109	659
109	662

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113	208

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120	963

State vs. Joseph.

is arrested on the ground that on the face of the indictment the offense is prescribed, the case should be remanded without prejudice to the rights of the State to a legal prosecution, if it is shown that an erroneous allegation had been made in the indictment which affected the question of prescription. 36 Ann. 978.

E. P. Veasie and *F. F. Perrodin*, for Defendant and Appellee.

MOTION TO DISMISS.

The opinion of the Court was delivered by

TODD, J. This appeal is taken by the State from a judgment sustaining a motion in arrest of judgment in a prosecution of the defendant for murder, resulting in his conviction of manslaughter.

There is a motion to dismiss the appeal on the ground that the transcript of appeal was not filed in ten days after the order of appeal was granted.

The appeal was granted on the 17th of November, 1887. The transcript was filed on the 30th, same month. The ten days expired on the 27th of November and the filing of the transcript was within three days thereafter, which was in time. *State vs. Corcoran*, 38 Ann. 950, *State vs. Butler*, 38 Ann. 392. *State vs. Hampton*, 33 Ann. 1252.

The motion to dismiss is therefore refused.

ON THE MERITS.

As stated above, the accused was tried on an indictment for murder and convicted of manslaughter. After the verdict of the jury was rendered, he filed a motion in arrest of judgment upon the ground substantially:

That his prosecution for and conviction of manslaughter was barred by the prescription of one year—more than one year having elapsed from the date of the commission of the offense as charged in the bill and the filing of the indictment.

The district attorney thereupon offered to traverse the motion in arrest and show that the death did not occur at the date charged in the indictment but subsequently thereto and at a date less than one year prior to the finding of the indictment—and, also:

That there had been no legal session of a grand jury between the death of the person charged to have been murdered and the finding of the indictment.

The trial judge rejected this traverse and sustained the motion in arrest and discharged the accused; from which the State has appealed.

The ruling of the judge was undoubtedly correct.

Apart from the effect—which the traverse involved—to contradict

State vs. Joseph.

an important averment in the indictment as to the time when the offense was committed—the causes relied on or asserted by the State to suspend the prescription pleaded were not alleged in the indictment, and to authorize such proof at any stage of the prosecution, it was essential that the proper averments with reference thereto should have been made in the bill.

In a similar case to the one before us, where a party had been tried for murder and convicted of manslaughter and the judgment had been arrested on a plea of prescription—the case of the State vs. Victor, 38 Ann. 978—this Court used the following language:

“To admit proof on the trial touching the existence of the facts necessary to a suspension of prescription it is essential that these facts should be averred in the indictment. (Citing State vs. Bilbo, 19 Ann. 76; State vs. Pierce, Ib. 90; State vs. Bryam, Ib. 435.) And this is necessary where the indictment charges murder only and the jury convict of manslaughter. (Citing State vs. Foster, 7 Ann. 255; State vs. Freeman, 17 Ann. 69; State vs. Morrison, 31 Ann. 211.) It is clear that such testimony was not admissible at that stage of the proceedings, or in fact at any stage of the proceedings, in the absence of the required averments in the indictment; but it was particularly objectionable on the trial of a motion in arrest, for the reason that such motion rests and must be determined on the face of the record, and also for the more vital reason that the motion presented questions of fact, which could be passed on alone by the jury.”

In the case from which we quote, while sustaining the motion in arrest of judgment, the Court did not, by the terms of the decree, put an end to the prosecution, but the judgment was arrested without prejudice to the State to further prosecute for the crime of manslaughter; and it is urged that in the instant case a like reservation should be made in the event we sustained the decree arresting the judgment, as we have done.

We cannot do this. It is to be noted that in the case of State vs. Victor referred to, and in the cases cited in our opinion sustaining our ruling therein upon the point under consideration, the cause of the suspension of prescription was not that urged in the instant case, but was the absconding or fleeing of the accused from justice, which prevented the running of prescription up to the very time of the filing of the indictment, so that another prosecution for manslaughter in that case would have been seasonable and unaffected by the question of prescription.

In the instant case, however, it is virtually admitted by the counsel

State vs. American Cotton Oil Trust et al.

for the State that a prosecution of the accused under another indictment for manslaughter would be futile, for he asserts that a new indictment for manslaughter would be prescribed on its very face, and could only legally have been filed before the 2d of November, 1887.

In view of the futility of a further prosecution for manslaughter under another indictment, the counsel urges that the case be remanded in order that he may amend the present indictment and try the accused under it as amended.

This cannot be done. The law contemplates and requires that amendments to an indictment must be made during the progress of the trial and before the case is submitted to the jury. This is especially manifest where the amendment consists, as in the instant case, of the averment of facts to be necessarily passed upon by the jury in making up their verdict.

After a judgment has been arrested, and arrested for an omission in the indictment of averments essential to the conviction of the accused, and where the prosecuting officer has failed even to ask leave to amend though the necessity for such amendment was disclosed to him during the trial, there is no authority for remanding the case that these omissions might be supplied and the party again tried under an indictment thus perfected, for the omission of which, in essential particulars, the judgment had been arrested and the conviction quashed.

Such a proceeding or disposition of the case would contravene the fundamental principals of the criminal law.

Judgment affirmed.

No. 10,016.

THE STATE OF LOUISIANA VS. THE AMERICAN COTTON OIL TRUST,
ET AL.

The only question on this appeal is as to whether a cause of action is set forth against Glenn & Violet.

Considering the allegation of the petition that the principal defendant has sold or exchanged \$24,000,000 of stock certificates for \$10,000,000 or less of property; and considering that the sole allegation connecting G. & V. with the matter is the simple one that they are engaged in selling and dealing in these certificates, without any suggestion that they act as agents of the Trust, or enjoy any exclusive privilege not open to every other person. Held: First, that no reason is set forth for enjoining G. & V. from selling, while leaving the rest of the world at liberty to do so; second, that whatever be the validity of the certificates as shares of stock, and whether or not they confer on the holders the privileges of corporate shareholders, they certainly represent an interest in the property for which they were taken, and have a value, and cannot be placed *hors de commerce* by an injunction.

State vs. American Cotton Oil Trust et al.

A PPEAL from the Civil District Court for the Parish of Orleans :
Houston, J.

M. J. Cunningham, Attorney General, and *E. Howard McCaleb*, for the State, Appellant.

Bayne, Denegre & Bayne and *Semmes & Legendre* for Defendant and Appellee.

J. O. Nizon, Jr., for Glenn & Violet, Defendants and Appellees.

The opinion of the Court was delivered by

FENNER, J. The State is appellant from two judgments, with which the main defendant in the case has no concern, and which are exclusively in favor of a subordinate defendant, the firm of Glenn & Violet. The first judgment is one dissolving the preliminary injunction, in so far as it concerned Glenn & Violet, and the second is one maintaining their exception of no cause of action and dismissing the suit as to them. A similar exception interposed by the American Cotton Oil Trust was overruled and the case, as to it, must pass to trial on the merits in the court below. The Oil Trust is not a party to this appeal and it is important that we should not trench upon the merits of its important controversy with the State further than the necessities of the case before us absolutely require.

The suit, as against the Oil Trust, has a two-fold object; first to restrain it from carrying on business, violating as is alleged, the Constitution of the State; secondly, to have it adjudged guilty of unlawfully usurping the franchises and privileges of a corporation without being duly incorporated.

Amongst other things, the petition alleges that the Oil Trust "has issued some \$34,000,000 of stock certificates and has sold or exchanged the same for property less than \$10,000,000 in value."

The solitary allegation connecting Glenn & Violet with the matter is the following: "That Glenn & Violet, a commercial firm domiciled and doing business in the city of New Orleans, are engaged in selling and dealing in so-called shares of stock issued by the said American Cotton Oil Trust."

This allegation does not import that, in their dealing, Glenn & Violet act, in any manner, as the agents of the Oil Trust, or that they enjoy any exclusive privilege of selling and dealing in these certifi-

 McCaffrey vs. Benson.

cates, or that they are doing anything which any number of other persons may not also be engaged in doing.

We are at once confronted with the inquiry as to how the purposes of the State in this suit are to be advanced by enjoining Glenny & Violet from dealing in these certificates, while leaving all the rest of the world at liberty to do so.

But a still more pertinent suggestion presents itself, which is this: If, as alleged, these certificates have been taken as the price or in exchange for \$10,000,000 of property transferred to the Trust, then, whatever be their validity and effect as shares of stock, whether or not they confer on the holders the privileges of corporate stockholders, and whether or not they confer any right to participate in the carrying on of any illegal business—yet, they undoubtedly do represent an interest in the property referred to and, as such, have a legal and real value, and we cannot understand how such property rights can be placed *hors de commerce* by an injunction.

Judgment affirmed.

No. 9961.

KATE McCAFFREY vs. JOHN H. BENSON.

A married woman, whose husband has left her, and has disappeared, and after several years is reported dead, and who believes that her said husband is dead, will be held to have been in good faith, in contracting a second marriage, although such marriage was subsequently declared judicially to have been null, for reason of her want of legal capacity to contract matrimony.

When both parties to a marriage declared null are shown to have been in good faith, such marriage will have its civil effects as relates to the parties, and among such effects will be included the legal community partnership of acquiescence and gains which results according to law from a legal marriage.

The community will be dissolved by the judgment which declares the nullity of the marriage; and its liquidation must be effected as would be the case with a community dissolved by the death of one of the spouses.

In such a case the property purchased by the husband from the time of the putative marriage, and remaining in his ownership at the date of the declared nullity of the marriage will be treated as belonging to the community.

But being the head and master of the community, the husband owes no account of the proceeds of any community property which he may have sold or otherwise disposed of, or for rents and revenues realized by him from property belonging to the community, during the existence thereof.

An action by a woman for her share in a community alleged to result from a lawful marriage will not sustain the plea of *res adjudicata* to an action by the same person against the same defendant, for the settlement of a community alleged to have resulted from a marriage declared null, between the parties. The cause of action is not the same in the two suits.

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A PPEAL from the Civil District Court for the Parish of Orleans;
Tissot, J.

J. O. Nixon, Jr., for Plaintiff and Appellee.

Louis F. Rouchereau and J. Duvalneaud for Defendant and Appellant:

1. The exception that the petition disclosed no right of action, because plaintiff was guilty of bigamy, and the judgment maintaining such exception and dismissing plaintiff's suit, is *res adjudicata* between the parties as to all matters contained in the petition. C. C. 2286, 2287; 1 Ann. 47; 19 La. 328; 3 Ann. 446; 12 Ann. 197; 23 Ann. 619; 14 La. 59.
2. It matters not under what form, whether by petition, exception, rule or intervention, the question be presented, whenever the same question recurs between the same parties, even under a different form of procedure, the exception of *res adjudicata* estops. 35 Ann. 553; 17 La. 92; 4 Ann. 231; 36 Ann. 398; Poth oblig. p. 518 §899.
3. The silence of the judgment on any demand which was an issue in the case under the pleadings must be considered as an absolute rejection of the demand. 3 M. 142; 7 N. S. 437; 39 Ann. 581 and 36 Ann. 398.
4. After issue joined, amendments which alter the substance of the demand by making it different from the one originally brought will not be permitted.
5. One will not be permitted to prove that which he has not alleged. 22 Ann. 479.
6. Where marriage is null and void no community can ever exist between the parties to it. 15 Ann. 519.
7. Judgment for a debt on account of theft will, between the parties, be evidence to prove not only *rem ipsam* but the theft. 4 La. 58. So also, judgment on an exception of no right of action on account of bigamy, opposed to a demand for a separation from bed and board and liquidation and settlement of the community, will be evidence to prove, between the parties, not only *rem ipsam* but the bigamy.
8. Plaintiff must make her case legally certain; to make it probable is not enough. 15 Ann. 268; 18 Ann. 29, 116; 19 Ann. 121 and 22 Ann. 378.
9. The court being in possession of all the facts and testimony necessary to enable it to pronounce definitively upon all the issues raised by the pleadings, can render such a judgment as should have been rendered by the district court. C. P. 905.

The opinion of the Court was delivered by

POCHÉ, J. By the judgment of this court, in the case entitled McCaffrey vs. Benson, reported in the 38th Ann. p. 198, a marriage previously contracted between the parties to this litigation, was declared a nullity on the ground that plaintiff was incapacitated from contracting a lawful marriage at the time that she attempted to marry the defendant Benson.

Her object in the present suit is to judicially enforce the civil effects alleged to have resulted from said marriage, under the provisions of Articles 117 and 118 of the Civil Code, which are in the following words:

117. "The marriage, which has been declared null, produces never-

McCaffrey vs. Benson.

theless its civil effects as it relates to the parties and their children, if it has been contracted in good faith."

118. "If only one of the parties acted in good faith, the marriage produces its civil effects only in his or her favor, and in favor of the children born of the marriage."

Plaintiff alleges that the marriage between the defendant and herself was contracted in good faith by both parties, and that one of the civil effects which it produced was a community of acquets and gains, in legal consequence of which she is joint owner with the defendant, in equal portions, of all the property acquired by him during the term of their cohabitation together; which extended from the year 1859, to the month of March, 1886, at which time their said marriage was declared null by the judgment of this court.

She therefore prayed to be recognized as the owner of one half of three pieces of immovable property and of some movable property, such as furniture, and forty shares of insurance stock; she also prayed for a moneyed judgment for her share of the rents and revenues of the immovable property from the year 1884, when she was cast out by the defendant, until she acquires possession of her share of said immovable property, and for one-half of the contents of a grocery store which the defendant sold out in 1884, and "for whatever sum may be found to be due upon the final liquidation of the said community or partnership."

Defendant appeals from a judgment in favor of plaintiff, recognizing her as owner of one-half of the immovable property described in her petition and of the forty shares of insurance stock, condemning defendant in a moneyed judgment, for one-half of the rents of the grocery store and of the furniture, in the sum of \$1289, and condemning him further to pay to plaintiff \$36 per month from December 31, 1886, as long as he remains in possession of her share of the immovable property.

The first contention urged by defendant was the plea of *res judicata*, predicated on the judgment of this court in the case of the 38th Annual herein above referred to.

As in that case plaintiff's demand was for separation from bed and board, and for one-half of the property belonging to the community existing between her alleged husband and herself; and as her entire demand was rejected by our judgment, defendant argues that said judgment is a complete bar to plaintiff's present action which sets up the same demand, for the same cause of action, between the same parties in the same capacity. Two of the essential requisits to the

McAffrey vs. Benson.

plea are to be found in the case; but the third is wanting, hence the exception is not good.

In the previous suit the claim for the community was grounded on an alleged lawful marriage, and in the present action the community rights sought to be enforced spring, as alleged civil effects, from a marriage which has been declared null, but which had been contracted in good faith. It is therefore clear that the cause of action is not identical in the two suits; and that the district judge did not err in overruling the plea.

In the case of *Cochran vs. Violet*, 38 Ann. 525, this court held that: "A final judgment rejecting, on the ground of prescription of four years, an action by a minor against his tutor for acts of the tutorship, cannot sustain the plea of *res judicata* to a subsequent action between the same parties for an account of the usufruct by the surviving parent of the property of his child, after the termination of the usufruct."

As here, the actions there, were between the same parties, for the same funds or amounts of money, but the causes of action are not the same.

Defendant's counsel next call our attention to an alleged erroneous ruling of the district judge, in allowing a supplemental petition, which they contend, altered the nature of the original demand. In her original petition, plaintiff, in enumerating the immovable property which belonged to the community, described a certain house and lot, which, she subsequently discovered, did not stand in the name of the defendant Benson, but in the name of "John H. Pierson."

The object of the supplemental petition was to allege that the placing of that piece of property in the name of "John H. Pierson" was a simulation, the property was truly and really owned by the defendant Benson. Such an allegation did not change the issue as originally tendered in her first petition; the gist of which was that the property formed part of the alleged community heretofore existing between the parties. The supplemental petition merely contained allegations which amplified the tendered issue, which could be covered by the one and the same judgment, as it was actually done in the judgment now on appeal. A simulation has no material existence, and need not be formally or judicially declared.

An adjudication, holding the reverse of a simulated appearance, disposes of the simulation, without any reference thereto in terms. We find no error in the judge's ruling.

The pivotal point in the case, on the merits, is the alleged good faith

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with which the putative marriage between these parties was contracted. And in considering that issue, courts must be guided by the rule that good faith must be presumed, that the presumption yields only to positive proof of the contrary. Hence, in this case, the burden of evidence is on the defendant to rebut that presumption, in so far as plaintiff is concerned. *Marcadé*, vol. 1, p. 524, §695; *succession of Taylor*, 39 Ann. 823.

The record shows that plaintiff was legally married in 1848, to one Christopher Anthony, who left her in 1851, and who disappeared in 1856.

In 1859, plaintiff, having been informed and believing that Anthony was dead, contracted marriage with Benson, who did not then know of the conditions of the previous marriage.

In 1861, Anthony re-appeared in New Orleans, and was seen by plaintiff's brother and by other persons; but it is in proof that plaintiff was not informed of Anthony's re-appearance, of which she remained in utter ignorance until the year 1865, at which time she heard it through the defendant Benson himself, who, at the same time, informed her that Anthony had since died. It then appears that the latter's reappearance had caused serious doubts in the minds of the parties and of their friends touching the legality of their marriage. Hence, on ecclesiastical advice, they went before a priest who administered the sacrament of matrimony to them some time in the year 1865.

It appears almost incredible that information of such importance, as the reappearance of the first husband, Anthony, could have been withheld from the most interested party, for such a length of time.

But the statement is made by plaintiff and by her brother in their testimony, and no attempt has been made to contradict them, not even by the testimony of the defendant Benson, who was present throughout the whole trial, and who was never put on the stand. His silence, under the circumstances, is strongly corroborative of that testimony, and warrants its acceptance as the truth. Such testimony had not as it could not have, been given on the first trial (38 Ann. 198), although, if similar proof had been then made, the conclusion of the court, as announced in that case, could not have been altered or modified in the least; because there, the issue was the validity of the marriage, and not the question of good faith of one, or both of the parties to a marriage since declared null.

But on the question of good faith, the present record is conclusive, and it leaves no doubt on our minds of the good faith of both parties

on both of the occasions on which they went through a marriage ceremony.

Having reached that conclusion, we must now determine whether the civil effects produced by that marriage, included or superinduced a partnership or community of acquets between the parties, as contemplated by the law-maker in Article 3399 of the Civil Code.

Our reports are about barren of adjudications precisely in point, and the discussion must therefore be met as a comparatively new question in our jurisprudence.

But as Article 117 of our Code has been taken literally from Article 201 of the Code Napoleon, we have directed our investigation to the construction of the Article which has prevailed under that system.

Our researches have led us to the conclusion that, where both the parties to a marriage, subsequently declared null, were in good faith, one of the civil effects was the legal community or partnership of acquets and gains which results from a lawful marriage; and that the relative rights of the parties must be tested under the same laws which govern the community rights *inter sese* of lawfully married spouses.

Toullier says: "Si les deux époux étaient obligés de se séparer de bonne foi, leurs droits seraient, à tous égards, les mêmes que si le mariage avait été légitime. Les droits de communauté s'exerceraient au moment de la séparation." Droit civil français; vol. 1, p. 378, § 661.

Treating of the same article, Demolombe wrote as follows: "Lorsque les deux époux sont tous deux de bonne foi, le mariage produit également, en ce qui les concerne, tous les effets civils, soit dans leurs rapports avec leurs enfants, soit dans leurs rapports réciproques. * * * La communauté, par exemple, se liquide et se partage comme si le jugement, au lieu d'annuler le mariage, l'avait seulement dissout, et tous les droits respectifs des partis doivent être déterminés comme si, en effet, la communauté elle-même s'était dissoute à partir de ce jugement." Cours du Code Napoléon; 3. vol. 1, p. 555, § 367.

Marcadé, in his commentaries on the same article, in which he notes the views of previous standard authors, uses the following clear, instructive and conclusive language:

"Quand il y a bonne foi de part et d'autre, le mariage produisant alors les effets légaux pour les deux époux, le partage de la communauté se fera comme il se serait fait entre les deux époux divorcés, ou comme il serait fait entre un époux et les héritiers de l'autre, lors de la mort de celui-ci; c'est-à-dire que ce partage s'effectuera d'après les règles du code, s'il y a communauté légale, et conformément aux

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clauses du contrat, s'il y a communauté conventionnelle." Explication du Code Napoléon ; vol 1, p. 527, §699 ; p. 531, §703 ; No. 8.

The same views are expressed by Duranton (*Droit Français*, Vol. 2, p. 344, §368) and by Laurent (*Doit Civil*, vol. 2, p. 646, §510.) In keeping with these views, which commend themselves by their clear logic and humane justice, and which we adopt as part of our jurisprudence on this question, we hold, in this case, that there was a community of acquets and gains between plaintiff and defendant, and that the said community was dissolved by the judgment of this court and in the case reported in the 38th of *Annuaire*, p. 198.

Hence it follows that plaintiff must be recognized as the owner of one-half of all the property owned by, and standing in the name of the defendant Benson in the month of March, 1886, and which had been acquired by him between that date and the year 1859, when he contracted marriage with Plaintiff Kate McCaffrey.

The record shows to our satisfaction that the lot and improvements thereon, situated at the corner of Cutomhouse and Derbigny streets, the titles to which are inscribed in the name of "John H. Pierson," was in truth and in fact acquired by purchase by John H. Benson, defendant herein, and was his lawful property at the date of the dissolution of the community ; hence we hold that it forms part of said community. We agree with the district judge in treating the two other pieces of immovable property as likewise belonging to said community or partnership.

But as the community which we have found to exist between these parties, must in all respects, be assimilated to the legal conjugal community of our Code, and subjected to all its rules, it follows that while said community lasted, Benson, as the head and master of it, had the legal right to administer its property as his own, including the power to sell or otherwise dispose of any and all of its property, without the obligation of accounting for the proceeds of sales or for the rents and revenues of the same during his said administration or before the dissolution of the said community. •

Hence it follows that the community rights of plaintiff must be determined by the condition of affairs as they stood at the date of the dissolution of the community, in the month of March, 1886.

There is, therefore, error in the judgment which condemns Benson to account for the rents and revenues of the community property, realized by him previous to the dissolution of the partnership ; for the proceeds of the grocery store, and for a stated amount of monthly rents, until plaintiff acquires possession of her share of the immovables. The

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judgment is also erroneous in charging him with the estimated value of one-half of the furniture; there is no proof that any such furniture was owned by him or in his possession at the date of the dissolution of the community. Defendant is accountable for rents and revenues of the community property, only from the date of dissolution thereof, subject to credits in his favor for taxes, insurance, repairs and other reasonable expenses incurred by him in the preservation of said property.

But the record is not in a condition to justify an attempt on our part to liquidate the community in the judgment which naturally flows from the principles which are announced in this opinion, and the cause must be remanded for that purpose.

In order to better condense our decree we shall recast the judgment appealed from in full, including that portion of which we affirm, as above indicated.

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed, except in so far as it recognizes a community or partnership between the parties herein, as a result of the putative marriage which they had contracted in good faith; and proceeding to render such a judgment as should have been rendered below, it is now ordered, adjudged and decreed that a community of acquets be recognized to have existed between Kate McCaffrey and John H. Benson, and that said community consisted of all the property moveable and immovable, acquired by said Benson from and after the year 1859, and owned and held by him, at the date of the dissolution of said community by the judgment of this Court in March, 1886, including the three pieces of immovable property described in plaintiff's petition in this case; and, it is further ordered that this cause be remanded to the lower court for the purpose of settling and liquidating said community according to law and according to the views herein expressed; the costs of this appeal to be taxed to plaintiff and appellee, the costs of the liquidation herein ordered to abide the final determination of the case.

No. 9963.

MUTUAL NATIONAL BANK OF NEW ORLEANS vs. JAMES REGAN, ET AL.

It appearing that defendant is the owner of the mortgage notes herein concerned and that he has actually paid the maker the face value thereof less a discount of nine per cent, he is entitled to recover the whole amount thereof, notwithstanding the inclusion of such usurious interest therein, under Art. 2894 Rev. C. C.

40	17
47	1886
40	17
104	40
104	41
40	17
113	290

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In an action to cancel and annul a mortgage on allegations of fraudulent simulation, where the holder of the mortgage notes has actually reduced them by indorsement thereon, before suit to the amount actually due and correctly admits such reduction in his answer to the suit, and where the reality and good faith of his mortgage to the full extent claimed by him are clearly established, the mere failure to have erased the record in the mortgage office to the extent of the reduction, cannot support a judgment against him throwing on him the costs of a suit, every issue in which has been decided in his favor. The proceeding was not one to erase or reduce an inscription, but to declare the simulation and nullity of the mortgage itself.

A PPEAL from the Civil District Court, for the Parish Orleans.
Houston, J.

Singleton, Browne & Choate for Plaintiff and Appellant.

W. S. Benedict and Harry H. Hall for Defendants and Appellees.

The opinion of the Court was delivered by

FENNER, J. On the 16th of July, 1884, James Regan executed a mortgage on immovable property in this city in favor of Charles P. McCan, for \$36,000, represented by two series of notes drawn by Regan to his own order and by him endorsed, viz: 1st. Three notes for \$5500 each, payable one year after date. 2d. Three other notes for \$6500 each, payable two years after date, all bearing interest only after maturity. The act contained a stipulation giving a preference and priority of mortgage in favor of the first over the second series of notes.

McCan became the owner of the first series of notes by paying to Regan the face value thereof less a discount of nine *per cent*. The other series of notes, though left in the hands of McCan, were held by him subject to the order of Regan and were designed to be negotiated by the latter to raise further means for use in his business. Regan, having failed to effect this negotiation, subsequently applied to McCan for a further loan on the second series of notes, and McCan agreed to take them to the extent of eight thousand dollars, provided that the notes should be reduced to that amount and cancelled as to the excess. Accordingly, he paid to Regan \$8000 less a discount of nine *per cent*, took one of the notes for \$6500 and another reduced to \$1500, which reduction was duly endorsed on the note itself, and the third note was cancelled. The cancelled note was exhibited at the mortgage office, and record was made of the reduction of the mortgage by its amount; and though no similar exhibit or record was made as to the second note, yet the reduction inscribed on the note itself absolutely confined McCan's claim under the mortgage to the reduced amount and made it impossible for him to claim more,

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The plaintiff bank, which, as the record indicates, only became a creditor of Regan after the date of all of the above transactions, having obtained a judgment against him and having seized the mortgaged property, filed a petition in said case against both Regan and McCan, charging that McCan's mortgage was a fraudulent simulation without any consideration or debt to support it, entered into for the purpose of covering up Regan's property and screening it from his creditors, and praying that said pretended mortgage be cancelled and annulled, and that petitioner be paid by preference out of the proceeds arising from the sale of the property.

To this petition McCan answered, setting forth the reality of his mortgage, but admitting that it had been reduced to the amount of \$24,500.

Judgment was rendered in favor of plaintiff and against McCan, reducing his mortgage to \$24,500 and otherwise maintaining it.

Plaintiff appeals and complains in Court that McCan's mortgage should be further reduced by the amount of the usurious interest charged by McCan in the transaction.

We do not see how this relief could be granted unless we should strike out Article 2924 of the Civil Code, which is in the following terms:

"The owner of any promissory note—to order or bearer—shall have the right to collect the whole amount of such promissory note—notwithstanding such promissory note may include a greater rate of interest or discount than eight per cent. per annum; provided, such obligation shall not bear more than eight per cent. per annum after maturity until paid."

McCan is undoubtedly the owner of these mortgage notes for \$24,500, which bear no more than eight per cent. interest after maturity, and whatever rate of interest or discount was included in the consideration paid for them, he is nevertheless, under the mandate of the law, entitled to recover the whole amount of the notes.

McCan's representative has filed an answer to the appeal, in which he prays for an amendment of the judgment so as to cast the costs in the lower court upon plaintiff.

We think he is justly entitled to this relief. The judgment is not responsive to the pleadings nor to any issue involved in the case. This was not a proceeding to erase the inscription of an extinguished mortgage. It is an action to cancel and annul the mortgage itself as a fraudulent simulation. McCann has not claimed a mortgage beyond \$24,500; on the contrary, in his answer to the petition, he distinctly

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limits his claim to that amount. There was no issue between plaintiff and McCan as to any right of mortgage in excess of \$24,500. The sole issue tendered and tried was as to whether McCann had any mortgage at all, or, if any, whether it was for as large an amount as the \$24,500 claimed by him. The judgment decided and rightly decided that McCan was entitled to all that he claimed and plaintiff's assault upon the reality and *bona fides* of his mortgage was utterly unfounded. The judgment should have been one in favor of the defendant and rejecting plaintiff's demand. The mortgage had been actually reduced to \$24,500 before the suit was brought and this reduction was admitted in the answer. Therefore, the judgment in favor of plaintiff, reducing the amount of the mortgage to \$24,500 was *dehors* the issue and only served to mulct the defendant in the costs of a suit, every issue in which was decided in his favor. There was no controversy about the erasure of the excessive inscription; no judgment was asked to that effect, and no such relief is even awarded by the judgment which only decrees the reduction of a mortgage which had already been effectually reduced before suit.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed, and that there be judgment in favor of defendant, Mrs. C. P. McCan, tutrix, and rejecting the demand of plaintiff at plaintiff's cost in both courts.

No. 10091.

THE STATE EX REL. THOMAS HENDERSON VS. JOHN MCCREA, JUSTICE OF THE PEACE FOR THE SEVENTH WARD, PARISH OF ST. BERNARD.

The objection that the supervisory powers of this Court cannot be exercised in appealable cases, is obsolete and has become a legal nuisance.

It is only where a judgment has been rendered by a Justice of the peace in the presence of the parties that notification of it can be dispensed with.

It is only when thus rendered, or after notice thereof has been given, that the delay to make the judgment final begins to run.

Act 24 of 1876, which amends article C. P. 575 so as to dispense with notice of judgment, where answer was filed or citation was served personally, applies to district courts and not to justices.

A defendant is always in time to apply for a new trial where the judgment was not rendered in his presence and where he was not notified of its rendition.

A justice of the peace, like all other magistrates, has the right to grant a new trial either on motion of the aggrieved party, or *proprio motu*, where he considers his previous finding erroneous.

A justice of the peace has the right to assign a case for trial on giving the parties notice and sufficient time to summon their witnesses.

40	20
e113	923
40	20
116	493

State ex rel. Henderson vs. Justice of the Peace.

A justice of the peace has no authority, where the plaintiff does not appear on the day of trial, to hear evidence by the defendant, in the absence of a reconventional demand, or the like, to pass upon the merits of the cause and render a judgment for the defendant and against the plaintiff, condemning the latter to pay a specified amount as costs.

The only judgment which he could have rendered was one of *non suit*. In acting otherwise he has exceeded the bounds of his jurisdiction.

Under the showing, the judgment rendered and complained of is irregular and the execution issued under it, is unwarranted.

Relator is entitled to relief.

A PPLICATION for Certiorari and Prohibition.

Sam. Henderson, Jr., for the Relator.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is an application for a *certiorari* and for a *prohibition*.

The complaint is that the justice of the peace has illegally set aside two final judgments in favor of the relator, on which executions had issued and seizure effected; that, in the absence of the plaintiff, he has, on a new trial granted, rendered a judgment on evidence heard in favor of defendant and by default against plaintiff, for the costs, liquidated at \$20 thereby, and that on this last judgment execution has issued; under which, property of plaintiff has been levied upon and advertised for sale.

The charge is, therefore, that the proceedings are *irregular* and that the justice has exceeded the bounds of his jurisdiction.

In the return, it is urged, that the remedy sought cannot be allowed in an appealable case and that the justice had a right to grant a new trial, which was asked seasonably.

The first objection is obsolete and utterly groundless. Under Article 90 of the Constitution, this Court can exercise its supervisory powers over all inferior courts, in all cases, whether appealable or not.

This has been so frequently decided, that pleas of that character have become legal nuisances.

The transcript of the proceedings before the justice of the peace show that the judgments, to which the relator refers, were *not* rendered in the presence of the parties and were *not* notified to the defendant, as is required by article C. P. 1139 on the subject of justices of the peace.

It is only where the judgment is rendered in the presence of the parties, that notification may be dispensed with; and it is only where the judgment is thus rendered, or notified, that the delay to make it final begins to run.

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Reliance on Act No. 24 of 1876, amending article 575 C. P. and dispensing with notice where answer has been filed and citation personally served, can afford relator no relief, as it relates to district courts and not to justices of the peace. State ex rel. R. R. Co. vs. Huft, 39 Ann. p.

Hence it follows that the executions issued prematurely and that the defendant, being in time, could apply for a new trial.

Independently of any prayer for such relief it was discretionary with the justice, as it is with all judges, to have set aside his previous findings if he thought them erroneous and to have reheard the cases.

The transcript does not show at whose instance the cases were re-fixed for trial; but this is immaterial, as the Code, Art. 1084, provides that a justice may fix such a day and hour as he thinks proper, allowing sufficient time to the parties to summon their witnesses, if it be necessary.

It does not appear that the plaintiff was present at the second trial and offered any evidence, while it is shown that defendant was in attendance and tendered proof which the justice considered.

In the absence of the plaintiff and of any evidence in his behalf and of any demand in reconvention, or such like, from defendant, the justice was without authority to pass upon the merits of the cases, to render judgment for defendant, thus exonerating him from liability to plaintiff and against plaintiff, condemning him explicitly to pay \$20 costs.

All the justice could have done legally was to have *non suited* the plaintiff, C. P., 536, but without specifying any amount. 3 Ann. 660; 4 Ann. 176; 15 Ann. 299.

The judgment complained of and the proceedings conducive thereto are on the face of the papers absolutely irregular and must be annulled. Being such, the execution issued against the plaintiff is unwarranted and the seizure of his property illegal. In acting as he has done, the justice has exceeded the bounds of his jurisdiction.

The relator is entitled to relief. C. P. 845.

It is therefore ordered and decreed that the judgment rendered on the 16th of December, 1887, and the execution issued thereunder be avoided and annulled and that the justice of the peace, respondent herein, be directed to try the cause anew in conformity with the provisions of the law. C. P. 864. And, it is further ordered that the restraining order herein issued be made preemptory and that relator recover his costs. C. P. 866.

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No. 10,001.

CATHARINE M. AIKEN ET AL. VS. THOMAS P. LEATHERS ET AL.

In an action in a court of Louisiana, on a bond of injunction or for a restraining order, issued in and by the order of a Federal Court in a chancery suit, conditioned to secure the defendant in such a suit against all damages which he may suffer from the injunction or restraining order in case the same may be decided to have wrongfully issued, counsel fees incurred for the dissolution of such an injunction, may be claimed and recovered as an element of the damages contemplated by the parties to the bond.

But the allowance cannot include the entire amount of fees paid by the obligee to his attorneys in the entire litigation, including the issue on the merits of the cause.

A PPEAL from the Civil District Court, for the Parish of Orleans.
Houston, J.

Thomas L. Bayne for Plaintiffs and Appellants:

A bond given for an injunction is a contract upon which plaintiffs obtain on the writ, and using it become responsible for the damages which its use occasions. 13 Ann. Rep. 21. This is true whether the bond was given in the Federal Court or State Court, 120 U. S. 206; 35 Ann. 220-1199; 37 Ann. 482; 105 U. S., 446.

The dissolution of the injunction establishes *prima facie* that the writ was wrongfully obtained, and subjects the plaintiff in injunction to the payment of damages caused by the use of the writ. 32 Ann. 1181; 33 Ann. 9; 35 Ann. 220-360-1199; 12 Ann. 181; 2 Ann. 873; 101 U. S. 301.

And as part of these damages, defendants in injunction are entitled to recover attorney's fees paid by them for setting aside the injunction. 37 Ann. 482; 120 U. S. 206; 105 U. S. 446; High on Injunction, Sec. 1683-1686. 35 Ann. 220-360, and cases above cited.

Drake on attachments 5th ed., §173, 13 Ann. 214-440; 20 Ann. 66; 27 Ann. 192.

In *Flietas vs. Halsey*, Opinion Book 56, p. 1210, counsel fees expressly allowed, and on rehearing, Opinion Book 57, p. 600, adhered to and damages increased.

This was on bond for attachment.

Chas. S. Rice and Howe & Prentiss for Defendants and Appellants.

The opinion of the Court was delivered by

POCHÉ, J. This is a suit for damages on a bond furnished by the defendants as the condition of a restraining order in a suit in chancery instituted by Thomas P. Leathers in the United States Circuit Court for the Eastern District of Louisiana, against Joseph A. Aiken.

The object of the suit was to have cancelled and annulled a wharf lease previously entered into between the city of New Orleans and Joseph A. Aiken. In addition to the principal demand, the complainant had prayed for an injunction *pendente lite*, and for a restraining order to prevent the wharf lessee from collecting dues from him, until the hearing of his prayer for injunction. The restraining order was issued on the 4th of August, and the rule for injunction *pendente lite*, was fixed for hearing on the 7th of November of the same year, 1881, and the amount of the bond for the restraining order was \$5000.

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On hearing, at the end of December following, the injunction prayed for was denied, and the restraining order was dissolved; the suit terminated shortly thereafter.

The claim in the present suit is for counsel fees in the sum of \$5000 and for other costs alleged to be incidental to the proceedings for the dissolution of the restraining order, amounting to \$410. The judgment of the district court allowed plaintiffs \$500 for attorneys' fees incurred by reason of the restricting order; \$168 as the cost of photographic views of the wharves and \$46 40 for affidavits taken for use in connection with the restraining order, making a total of \$714 40, and both parties have appealed.

The principal contention of the defendants is that no counsel fees can be recovered in an action on an injunction bond furnished under the order and jurisdiction of a Federal Court, in an equity proceeding. This point had been previously presented by way of a peremptory exception of no cause of action pleaded *in limine* in this case, and it was considered by this court in the opinion reported in the 37th Ann. p. 482.

In that opinion it was held in emphatic and unmistakable language that the exception was not good, and that the action for counsel fees could be maintained on the bond now in suit.

At the urgent instance of defendants' able counsel we have carefully reviewed our previous opinion, and have gone over the whole ground of discussion submitted by counsel, including a serious consideration of the opinion of the Supreme Court of the United States in the case of Oelricks vs. Spain, 15 Wallace p. 211.

In that case it appears that the injunction was the primary, exclusive and ultimate object of the entire litigation. Its object was to restrain the custodian or trustee of a large fund from paying over and distributing the same to the parties for whom he held the trust, and to enjoin the parties aforesaid "from asking for or receiving said fund."

In keeping with the order of the court, the bond was conditioned that the plaintiff in injunction "shall prosecute the writ of injunction to effect and pay as well the costs, damages and charges that shall occur in said circuit court . . . as all costs, damages and charges that shall be occasioned by said writ of injunction," etc., etc.

After the dissolution of the injunction, a bill was brought in chancery by the obligees of the bond to recover damages in the shape of interests and counsel fees.

In disposing of the contention involving the allowance of counsel

fees, the court, considering that the entire litigation consisted of the injunction, assimilated the demand to one made to recover counsel fees from the party cast in an ordinary action, and not on a bond.

The court said: "It is the settled rule that counsel fees cannot be included in the damages to be recovered from the infringement of a patent. They cannot be allowed to the gaining side in admiralty as incident to the judgment beyond the costs and fees allowed by the statute."

In concluding, the court added: "In debt, covenant and assumpsit damages are recovered, but counsel fees are never included. So in equity cases, where there is no injunction bond, only taxable costs are allowed to the complainants. The same rule is applied to the defendant, however unjust the litigation on the other side. * * *

The parties in this respect are upon a footing of equality. There is no fixed standard by which the *honorarium* can be measured. Some counsel demand much more than others; some clients are willing to pay more than others; more counsel may be employed than are necessary. When both client and counsel know that the fees are to be paid by the other party there is danger of abuse. A reference to a master or an issue to a jury, might be necessary to ascertain the proper amount, and this grafted litigation might possibly be more animated and protracted than in the original cause."

As all the considerations which led that exalted tribunal to a denial of counsel fees as an element of damages, refer to a demand assimilated to a claim for damages in an injunction suit proper, and to such a demand in chancery, we feel justified to conclude that the court did not intend to exclude such a demand in a suit at law, much less in an action filed in one of our State courts, in which there is no chancery, as contradistinguished from, a jurisdiction of common law, or in a case in which a preliminary restraining order had been granted merely as ancillary to a principal demand for the cancellation of an important and valuable contract. These views are substantially confirmed by the reasoning used, and by the conclusions reached by the Supreme Court in the cases of *Meyers vs. Block*, *Meyers vs. Levy*, reported in 120 U. S. Rep. p. 206, which went up from this court on writs of error.

In the decision of those cases the Supreme Court established a clear distinction between the issues involved therein and the questions presented in the case of *Bein vs. Heath*, 12 Howard 168. In view of the great reliance placed by defendants' counsel herein, on the latter decision, as sustaining the same views alleged to have been announced

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in the case of Spain vs. Oelrichs, we attach great importance to the decision in the Block case.

In that case the obligors on the injunction bond, who were therein sued on the bond, had made the point which defendants substantially make here; that an action on a bond of injunction given in equity in and by order of a Federal Court, could not be entertained against the obligors on the bond in the court, and subjected to the law and jurisprudence of the State of Louisiana. And they had rested their argument on the authority of the case of Bein vs. Heath above referred to. After reviewing that case, and sustaining the views therein announced, the court proceeded to demonstrate the difference between it and the Block case, saying: "But, according to our view, the bond sued on in the cases before us do not demand any such construction. It is plain that they could not be intended as security for any debt or *demand in litigation*, (italics are ours) but as security only for the damages that might be sustained by the issuing of the injunctions. The condition is to pay "all such damages as he (Isaacs, in the one case, and Block in the other) may recover against us in case it should be decided that said writ of injunction was wrongfully issued."

Recover how? By the law of Louisiana, damages may be recovered for suing out an injunction without just cause, independently of a bond. 3 La. 291. But this cannot be done in the United States Courts. Without a bond, no damages can be recovered at all. Without a bond for the payment of damages or other obligation of like effect, a party against whom an injunction wrongfully issues can recover nothing but costs, unless he can make out a case of malicious prosecution. It is only by reason of the bond, and upon the bond, that he can recover anything. When, therefore, the condition of the bond in these cases declares that the obligors will pay such damages as the obligee may recover against them, it must mean that they will pay such damages as he may recover by a suit on the bond itself. Otherwise it is senseless and vain. Construed in this way, it is in strict conformity with the order which required it. It is in this way that the bonds in question were finally construed by the Supreme Court of Louisiana, and we think its construction was right. Block vs. Meyer, 35 Ann. 220.

The condition of the bond in suit in the instant case was that the obligors would "well and truly pay to Aiken all such damages as he may recover against us in case it should be decided that the injunction or restraining order was wrongfully obtained;" which is almost in

terms precisely similar to the conditions in the bonds construed in the Block-Levi cases by the Supreme Court of the United States.

Now a reference to the records of those cases shows that counsel fees were an element of damages, in the demand as well as in the proof. Hence we feel authorized to conclude that the decisions which we have considered and consulted are not to be construed as excluding counsel fees as an element of damages in an action *at law* in a Federal Court, and *a fortiori* in a Louisiana court for the recovery of damages on a bond of injunction given in and by the order of a Federal Court in an equity proceeding.

Hence we hold that defendants' contention on that point is not supported by the authorities relied upon, and that it cannot be sanctioned in our jurisprudence. We feel relieved from judicial responsibility for any error of judgment which we may commit in reaching this conclusion, by the thought that it lies within the power of defendants to obtain a correction of such error at the hands of the exalted tribunal whose decision on the point would be our guide for the future.

With these views, we reach the discussion of the right of plaintiffs, under the evidence, to recover counsel fees as damages incurred as a result of the restraining order.

On that branch of the case defendants contend that plaintiffs are not entitled to recover damages for counsel fees, on the ground that the dissolution of the restraining order did not result from any proceedings or hearing instituted or had for such dissolution, but that it flowed from the hearing and the refusal of complainant's application for an injunction *pendente lite*, to which were directed all the professional labors and services of counsel of the respondent in the equity proceedings.

To a great extent that contention is supported by the record, from which it appears that the fees paid to such counsel by the defendant embraced all the services rendered by counsel in the suit of Leathers vs. Aiken. The receipts given by the two law firms employed by him in the litigation, each for \$2500, show further that the sums thus received were in full of all legal services to January 1st, 1882, including suit of Leathers vs. Aiken, U. S. Circuit Court." Hence the inference is irresistible that the entire amount of fees thus settled for, could not have been understood by the parties themselves, attorneys and clients, as having been earned in proceedings which resulted in the dissolution of the restraining order alone, or even in the entire litigation.

It also appears from the record that as the judge was, during his summer vacations, absent from his circuit, and as counsel for com-

Champon vs. Champon.

plaintant had declined to appear and argue a motion for dissolution of the restraining order, at any point or place outside of the circuit, there was no formal hearing of such a motion, before the hearing which took place in December following, on the question of complainant's right to an injunction *pendente lite*.

But it is in proof that counsel for the defendant in the equity suit, did perform some special labors and render some professional services required and demanded exclusively by the necessities of the case for the dissolution of the restraining order. The district judge has estimated the value of such services at five hundred dollars, and we find no grounds to justify us in disturbing his conclusions on that point.

We therefore deny the increase asked for by plaintiffs. And, with the district judge, we find that defendants must likewise be held for the two additional amounts allowed by the judge *a quo*. From our reading of the record we are satisfied that the photographs taken of the wharves and the affidavits prepared and the aggregate cost of which make up the sum allowed, were necessitated by the effect of the restraining order.

It is therefore ordered, adjudged and decreed that the judgment appealed from be affirmed at the joint costs of plaintiff and defendants in equal proportions.

No. 9962.

MRS. C. E. CHAMPON VS. C. E. CHAMPON, HER HUSBAND.

Where a marriage is solemnized in France, and the husband subsequently abandons his wife and comes to Louisiana, he cannot prosecute a suit against his abandoned wife for a divorce in a court in this State by causing a *curator ad hoc* to be appointed to represent her, through whom she is cited, and the wife is not notified of the proceedings and the judgment of divorce rendered in the suit will be regarded as rendered without citation and such judgment will be an absolute nullity.

A PPEAL from the Civil District Court for the Parish of Orleans.
Monroe, J.

Bayne, Denegre & Bayne for Plaintiff and Appellee.

Semmes & Legendre and *R. T. Beauregard* for Defendant and Appellant.

ON EXCEPTIONS.

1. No appeal can be taken after the expiration of a year from the rendition of the judgment, C. P. 593; (and two years when the defendant is absent from the State.) *Ib.*
2. An action of nullity for vices of form should be brought within one year from the rendition of the judgment, and can only be allowed in the cases enumerated in Art. 606. In case of charge of fraud or ill practice the action should be brought within one year of the

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45	256
45	008
40	28
52	1495
40	28
105	115

Champon vs. Champon.

discovery of the fraud or ill-practice, and the plaintiff must show that he was guilty of no neglect or laches; that he has been injured; and has not neglected his means of defence. 23 Ann. 146 and authorities there cited; C. P. 613; 18 Ann. 280, 507; 3 Ann. 646; 6 Ann. 799; 29 Ann. 105; 31 Ann. 467; 32 Ann. 13, 409.

3. Vices of form not mentioned in Art. 606 C. P., and omissions of procedure, or insufficient evidence, can only be urged on appeal and not by action of nullity. 23 Ann. 147 and authorities there cited and those above.
4. The admission of the wife's testimony (or husband's) in a suit against the husband, without objection, is not an absolute nullity. If she be allowed to testify, her testimony should go to the jury (or to the judge). 28 Ann. 604, 605, State vs. Williams.
5. A *curator ad hoc* can validly acknowledge in writing service of petition and citation addressed to him as such, and such acknowledgment brings the defendant into court, and interrupts prescription. 31 Ann. 540.
6. The motion made by a judgment debtor to annul the judgment for want of jurisdiction because he resided in another parish, made actual citation unnecessary, and cured the defect if there had been no citation. 10 R. 140; 11 Ann. 197; 31 Ann. 540.

JURISDICTION.

5. Act No. 76 of 1870, p. 108, and Art. 141, Rev. C. C. 1870, and section 1995 Revised Statutes of 1870, gave, by the former, as *absolute causes of immediate divorce*, the causes of separation in the former Code. The new Code authorizes the appointment of an attorney to represent either defendant when *absent, contradictorily with whom the suit "shall be prosecuted,"* the word *him* in the article means *her* when the husband is plaintiff, (see C. C. 3556, par. 1); the R. S. clothed the Third District Court of Orleans with jurisdiction in divorce cases.
6. The conjugal domicile is that of the husband, C. C. 39, 120; and a husband married in a foreign country can emigrate to this country, become a bona fide permanent citizen and resident of this State; in that case the conjugal domicile is legally transferred to the country and State of his adoption and allegiance, and the proper State Court vested with jurisdiction as to his status and suits for separation or divorce in accordance with the laws of said adopted domicile. (See quotations in the brief from Bishop, Story, etc.)
7. A fact testified to by competent witnesses will be accepted as proved if there is no evidence tending to impeach their credibility. 32 Ann. 251; 35 Ann. 1096.
8. *Qui tacet consentire videtur*, is a safe maxim of estoppel. Hennen N. D., verbo Evidence (f) par. 6, 11, and actions and omissions of duty on the same principle speak louder than words.

The opinion of the Court was delivered by

TODD, J. This is a suit to annul a judgment of divorce obtained by the present defendant against the plaintiff, his wife.

The judgment attacked was rendered by a district court of the parish of Orleans, in this State, on the 16th of March, 1874.

Among the grounds of nullity urged against the judgment assailed, is the want of citation, *i. e.* that the judgment in question was rendered without citation to the wife, the defendant therein.

The facts are these: The parties were married in France in 1852. In 1855 Champon, the husband, abandoned his wife and came to this country and joined his concubine here, who together subsequently came to New Orleans, where they continued to reside.

Champon vs. Champon.

Some time prior to 1874 the deserted wife came to the United States and lived in New York City, to the knowledge of her husband.

In February, 1874, Champon instituted a suit for divorce against his wife, on the ground of excesses, ill-treatment and abandonment. In his petition he alleged that his wife was absent from the State and resided in some part of the United States unknown to him, and he prayed and obtained the appointment of a *curator ad hoc* to represent her.

This appointment was made on the 3d of March, 1874, and upon the same day citation was issued and served (quoting) "upon Mrs. E. Champon, wife of C. E. Champon, through A. Briegne, Esq., appointed attorney *ad. hoc*."

Upon the 5th of March the curator filed an answer, substantially a general denial.

The case was submitted on the 11th of March; on the 16th, same month, judgment granting the divorce was rendered, and was signed on the 20th.

There were no proceedings had in the case such as summonses and orders to return and notifications directed to the wife, to establish abandonment as prescribed by the Code. In point of fact, she was entirely ignorant of the proceedings and remained in ignorance of them until a copy of the judgment was forwarded to her in New York.

We have no hesitation in concluding, under this state of facts, that the judgment was an absolute nullity.

The only provision in our law for the appointment of a *curator ad hoc* to defend an absentee is in Arts. 56 of the C. C. and 116 C. P. and R. S. 1198.

These articles were for a long time the subject of conflicting decisions, but finally it was settled that the articles in question presuppose something upon which the jurisdiction of the court can properly rest. Such, for instance, as the party sued having property in the State, or being a necessary party to some judicial proceeding, or contract, or convention sought to be annulled. 2 Ann. 562; 3 Ann. 101.

Marriage under our law is a civil contract. A decree of divorce, dissolving the marriage rests on the same principle on which all contracts may be dissolved, *i. e.* by reason of an active or passive violation of the obligation of the contract by either party thereto. But with regard to the contract of marriage particular rules are prescribed and mode of proceeding established, by or through which the parties to such contracts aggrieved may enforce their rights, either by a separation from bed and board or an absolute divorce.

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These rules are defined in the articles of the Code on the subject of divorce and separation from bed and board.

It was held in the case of *Prindle vs. Williams*, 9 Ann. 34, that there were only two cases in which a curator could be appointed to absent wives in suits instituted by their husbands for divorce or separation from bed and board; one where the defendant is charged with the commission of an infamous crime and being a fugitive from justice, or a separation is claimed on the ground of abandonment. *Muller vs. Helton*, 13 Ann. 1.

This divorce proceeding that we are reviewing does not fall within either of the conditions named where such an appointment could be made.

It is true that among the charges enumerated in the petition for divorce, is that of abandonment; but it is manifest from an examination of the record in that case that the judgment was in no way founded on that cause, or that abandonment formed any factor whatever in the entire proceeding. Abandonment in the first place is no legal cause or ground of divorce. In the next place, to make it effective, even as a cause of separation from bed and board, it must be established by the mode prescribed by the Code; that is, by the summonses and interlocutory orders directed by the Code; Art. 1451; *Perkins vs. Potts*, 8 Ann. 14; *Bienvenu vs. Buisson*, 14 Ann. 387; *Merrill vs. Flint*, 28 Ann. 195.

In the entire proceedings in this case we find nothing of the kind, so that the divorce was undoubtedly granted on account of the cruelty and excesses charged.

Besides, the pretense of abandonment by the wife was predicated upon a dictum of the law that had not the slightest bearing on the facts of the case. That dictum is that the domicile of the husband is or becomes the domicile of the wife. The only matrimonial domicile the parties ever had was in France, where they lived together for a time after their marriage. This domicile the husband abandoned, and is next found in this country dwelling with his concubine, and hiding from his lawful spouse, who is in utter ignorance of his whereabouts.

It would do violence to the plainest principle of common sense and common justice to call this residence of the guilty husband, where the wife is forbidden to come, or of which she knows nothing, the domicile of the wife.

The true meaning of this aphorism, touching the domicile of the wife being that of her husband, is that the domicile of the wife is the

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domicile that the husband has at his marriage, or provides after marriage for himself and his wife, and which, though he may change at pleasure, it must be one to which the wife is taken or invited, or at least of which she knows, and to which she may go and stay at her will.

The divorce suit in question was in fact a fraud on the very law invoked to justify its institution and to support the judgment which follows it.

Concluding, therefore, that the wife was never cited and that the judgment was, in law, rendered without citation, of course, it was an absolute nullity and the marriage with legal effects remained intact, unimpaired and unaffected by the vain proceeding directed against it. The judgment dissolving it being thus void on the very face of the proceeding, could not, of course, be protected by prescription, which is pleaded against the action to annul it.

Judgment affirmed.

Poché, J., concurs in the decree.

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44	349
40	32
114	281

No. 10,013.

H. REARY, FOR THE USE, ETC., VS. THE LOUISVILLE, NEW ORLEANS
AND TEXAS RAILWAY COMPANY.

It is not within the scope of the employment of a baggage-master connected with a railway train, but not shown to have been put in charge of the same, to invite or permit any person or persons to enter and ride on a coach of such train. Permission given in such circumstances cannot create the relation of carrier and passenger between the company and the person thus riding on such car. The company is not liable to such persons for injuries which they may receive, unless for negligence or tortious acts on the part of the company.

A railway company is not bound to the same degree of care in regard to mere strangers who are unlawfully upon its premises that it owes to passengers conveyed by it.

A railway company is not liable to a person, whether passenger or trespasser, who in a state of panic or fear jumps out of a train in motion, and is injured thereby, in the absence of proof that such panic or fear was caused or inspired by word or act by an agent or employee of the company.

A PPEAL from the Civil District Court for the Parish of Orleans.
Tissot, J.

Braughn, Buck, Dinkelspiel & Hart for Plaintiff and Appellee.

Farrar & Krutchnitt for Defendant and Appellant:

Railway companies owe no duties to persons who go upon their engines, cars or other means of transportation, as trespassers, and are, therefore, not liable to them for anything less

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than wilful injury. If the trespasser's injuries are the result simply of a failure to perform that duty which the railway company owes to every one who is rightfully upon its cars or other means of transportation, he cannot recover, for he was not rightfully there; and the railway has not failed to perform any duty which it owed to him. *Patterson's Railway Accident Law*, pp. 188 to 190: *Duff vs. A. V. R. R.*, 91 Pa. St., 458; *C. & N. W. R'y Co. vs. Smith*, 46 Mich. 504 (4 A. & E. R. R. cases, 535); *Cauley vs. P. C. & St. L. R'y*, 95 Pa. St., 395; 98 Id., 498; *Hestonville Passenger R'y Co. vs. Connell*, 88 Pa. St., 520; *Central Br. U. P. R'y Co. vs. Henigh*, 23 Kansas, 347; and numerous cases cited in the decisions and authorities above listed.

If a child, whilst playing with other children, enters a car forming part of a train of a railway company, which is being shifted from one track to another in or near its depot yards and not about to start upon a trip over the railway of such company, and whether the child enters such car with or without the permission of the company's agent in charge of the train, the relations of passenger and carrier do not arise. If such permission be given, the child is a mere licensee; if not given, it is a trespasser. But in no event, under such circumstances, can it become a passenger, and the law governing the relations between carriers and their passengers has no bearing on the case. Same authorities as above; and also, *Thompson on Carriers of Passengers*, p. 42, *et seq.*

If a child, whilst playing about a depot of a railway company, is invited upon, or even placed upon, a train of such company by a baggage-master, or person in charge of the baggage upon such train, but not in charge or control of the train, then the company is not liable for injuries due to the entry of such child upon, or its egress from the cars. In order that a person be liable for the acts of its agents, such acts must be done by such agents in the course of their employment, and within the line of their duties. The mere fact that a wrongful act is committed by a servant, even whilst actually engaged in the performance of the service he has been employed to render, cannot make the master liable. Something more is required. The act must not only be done whilst so employed, but it must pertain to the particular duties of that employment—must be within the scope of his employment. *Pierce on Railroads*, p. 277; *Hansen, tutor, vs. Mansfield, etc., Co.*, 38 Ann. 111; *Snyder vs. Hannibal and St. Joseph R'y Co.*, 60 Mo. 413; *Flower vs. Penn. R. R. Co.*, 69 Pa. Stat., 210; *Chicago R'y Co., etc., vs. Michie*, 83 Ill. 427.

The proximate cause of the damages in this case was the negligence of the injured child in jumping, and of its elder sister in allowing it to jump, from a car in motion; and also the act of that sister in interfering with the child whilst so jumping, and thus dragging it under the car.

The opinion of the Court was delivered by

POCHÉ, J. Suing for the use of his minor child, plaintiff claims damages in the sum of ten thousand dollars for personal injuries inflicted on his child by one of the defendant's trains, through the alleged carelessness and negligence of the company's employees.

Defendant appeals from a judgment of \$3000, based on the verdict of a jury.

The evidence is very conflicting on the salient features of the case, but from our reading of the record we find the following pertinent facts from the preponderance of the testimony.

The accident occurred at the company's depot, which is situated on, and occupies the neutral ground or space included between two streets—

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or thoroughfares, known as North and South Poydras streets, in this city, on a train of passenger cars which had just arrived, had discharged its passengers and their baggage, and was being switched out of the main track, in order to be set at rest on a side track for the night.

While plaintiff's daughter, between eight and nine years of age, was playing in and around the depot, with four other girls a little more advanced in years, one of whom was her sister of about thirteen years of age, the girls took a child's notion of riding on that train, while it was under the operation of being switched off, at about 7 o'clock in the evening in the month of November, 1886.

One of the girls asked and obtained permission so to do, of the baggage-master of the train, who was standing near by preparatory to his leaving for home.

Four of the girls entered one of the passenger coaches and took seats at the end towards the baggage car, and the fifth child caught on, and remained outside on, the steps of the coach. As the train was in the act of being moved out of the main track, at a pretty rapid rate, the girls became alarmed at the belief and fear that the train was running out of the city, and going, as several of them say, "out to Baton Rouge," whereupon they ran out of the coach and precipitately jumped out of the car. It was in that flight that plaintiff's youngest daughter fell, and that her foot was seriously injured by being run over by one of the wheels of the coach.

Under that condition of things the defendant makes the point that the baggage-master had no authority, within the scope of his employment, to grant the request of the children for permission to ride on the train, so as to render the company liable for injuries resulting from such permission. The record shows that the train was not under the charge or control of that employee, but that it was under the responsibility of another and entirely different person, who had no knowledge of the presence of the girls on that train. The record is conclusive on that point, and the authorities are equally clear on the law. The baggage-master has no duty or authority with the train, whether running or at the depot; and his permission to the girls to ride on that train cannot bind or affect the rights or obligations of the company. *Pierce on Railroads*, p. 277; *Snyder vs. H. & St. J. R'y Co.*, 60 Mo. 413; *Gillett vs. Mo. Valley R. R. Co.*, 55 Mo. 315; *Hanson vs. R. R. Co.*, 38 Ann. 111.

It is in proof that vigorous orders had been given by the management of the company to drive away children who came to play in and

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around their depot, and that to the knowledge of the girls many children have thus been ordered away. It is thus made clear that the permission given by the baggage-master was unauthorized under the scope of his employment, and in direct violation of the company's rules and regulations.

It is also in proof, beyond a doubt, and it is not disputed by plaintiff, that the train was not in use or motion, at the time of the accident, to carry passengers under its purpose as a common carrier, but that it was being pulled back and forth, merely and exclusively with the intention of removing the coaches from the track on which they had entered the depot, and of preparing them for the formation of another train for use in the company's business on the next day. Hence, it clearly follows that the relations of carrier and passenger did not arise between the defendant and plaintiff's child.

Now, in one of the cases very strenuously relied on by plaintiff, the case of Railroad Company vs. Stout, 17 Wallace, 657, the Supreme Court of the United States laid down the following pertinent rule:

"That while a railway company is not bound to the same degree of care in regard to mere strangers who are unlawfully upon its premises that it owes to passengers conveyed by it, it is not exempt from responsibility to such strangers arising from its negligence or from its tortious acts."

The rule is not only supported by authority but it finds its sanction in principles of reason, common sense and natural justice. It is in fact a universal rule on the subject of the responsibility of common carriers.

But under the circumstances of this case we feel warranted to extend the scope of the rule still further, and to hold the defendant company to the same degree of care towards the children who were in that coach, that it would owe to passengers being conveyed by it on a journey, after payment of their fare.

Our reading of the record has entirely failed to disclose any act of negligence, or dereliction of any duty, on the part of the company, which it owed to those girls, even if they had been regular passengers on a journey over its road. An attempt has been made to show that the panic among the girls and their precipitate flight from the coach were caused by the act of one of the company's employees, who suddenly and without warning blew out the lights in the car, and his act is qualified as reckless and mischievous.

But that contention finds no support in the record. In their testimony, two of the girls state that they did not notice whether there

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were any lights in the coach or not; and not one of them is certain of having seen any person or persons put out the lights.

We are entirely satisfied from the evidence that the panic among the girls was caused by the fear that they might have made a mistake, and had entered a train which was going to Baton Rouge. Hence, impelled by that fear, they attempted to jump out while the train was in motion. Now, supposing that any passenger on a regular train should labor under a similar mistake, in believing, for instance, that the train was passing by the station to which he was destined, and fearing that he might be carried beyond the same, should jump out as the train was pulling out of the station, and be injured by falling, could the company be held liable for injuries thus received? Evidently not.

In that case as in this, there would be no ground to conclude that the company had been guilty of any negligence towards the passenger on its train. Where is the duty which the defendant corporation owed to plaintiff's child and which it did not discharge or perform?

By remaining on the coach until it had been switched off on the side-track, she would have been perfectly safe; and could have stepped out, as she and her companions had doubtless intended to, and as they knew that they could, do without the slightest danger.

Who is responsible for the ungrounded fear of the girls that the train was being run out of the city, or perhaps to Baton Rouge, and which is beyond a doubt the proximate cause of the accident? They were alone in a coach, where they had entered voluntarily, with the childish intention of taking a ride while the train was being switched off. They say themselves that after they had taken their seats in the coach, the baggage-master moved from the platform in front of them, and entered the baggage-car, where his duty called him.

There is no pretence that a single word was spoken to them after they had taken their seats in the coach by any officer, servant or other employee of the company, or that they were ordered off the train by any one. In running out, and jumping off, they were impelled by motives with which the company had not the remotest connection or agency.

And in that feature the circumstances of the case are much more favorable to the company than in any of the reported cases on which her counsel rely in their brief. *Cauley's case*, 95 Pa. St., 395; 98 id. 498; *Duff vs. A. V. R. R.*, 91 Pa. Stat. 458.

Under our view of the case, and from our solution of the pertinent facts flowing from the weight of evidence, we hold that the pivotal

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question does not hinge on the contributory negligence of the passenger, but exclusively on the entire absence of negligence of the company. *Flowers vs. Penna. R. R. Co.* 69, Penna. Stat. 210.

Our opinion is that the verdict of the jury is manifestly erroneous, and that in justice, it must be set aside.

It is, therefore, ordered, adjudged and decreed that the verdict of the jury be set aside, and the judgment of the district court annulled, avoided and reversed, and it is further ordered that plaintiff's demand be rejected and his action dismissed at his costs in both courts.

No. 10,034.JAMES A. RENSHAW VS. HIS CREDITORS.

Powers of attorney to sell and transfer the property pledged, given by the pledgor to the pledgee, as an adjunct to the contract of pledge itself, are not revoked by the insolvency of the pledgee or other causes stated in C. C. Art. 3027.

The Art. 3027 is derived from the Code Napoleon and expresses a general principle of universal jurisprudence on the law of mandate, and the construction has been uniform under all systems that it did not apply to powers coupled with an interest in which the mandatory was made a *procurator in rem suam*.

The amendment of the article by Act No. 19 of 1882 is considered and construed as not inconsistent with the foregoing principles or preventing their continued application.

The right of retaining possession of the thing pledged until payment of his debt, conferred on the pledgee by Art. 3164 C. C. is an essential constituent of the *ius pignoris* and not affected by the cession of the pledgor. The syndic may, on proper showing or proper proceeding, compel the liquidation of the pledge by sale so as to ascertain any possible *residuum* applicable to other creditors; but he does not acquire the right to demand the surrender of the pledged property into his official control and administration and subject to the costs and charges thereof.

A PPEAL from the Civil District Court for the Parish of Orleans ;
Tissot, J.

A. J. & Omer Villeré, for the syndic, Plaintiff and Appellant.

1. Powers of attorney, to transfer stocks on the books of corporations, expire by the failure of the principal. Act 19 of 1882.
2. The syndic of an insolvent has the exclusive right to administer upon the property surrendered and to sell the same subject to the claims of privileged creditors. 34 A. 389; 31 A. 869; 1 N. S. 417; 2 N. S. 22; R. S. 1813; C. C. 3166; 31 A. 870; 14 A. 560.

Henry Denis, for the Hope Insurance Company, Defendant and Appellee :

- ▲ pledgee, under ordinary circumstances, cannot be compelled by the syndic of the insolvent debtor to surrender the pledge to him. *Jacquet vs. Creditors*, 38 Ann. 863.
- ▲ power of attorney, coupled with an interest, is not revoked by the insolvency of the principal. *Jacquet vs. Creditors*, 38 Ann. 863; *Allen, Bush & West vs. Nettles, Adm.*, 39 Ann. 791.

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46	1065

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52	1618

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117	413

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122	82

40	37
123	324

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Act No. 19 of 1882, embodying Article 3027 of the Civil Code, does not affect the rule that a power of attorney, coupled with an interest, is not revoked by the insolvency or death of the principal.

The pledge and power of attorney of this Appellee being anterior to the Act of 1882, could not, in any case, be impaired by it.

Leovy & Blair, for the Sun Mutual Insurance Company, Defendant and Appellee :

" If, among the assets of the insolvent, there be a thing pledged, the possession of it does not pass to the creditors, being vested in the pledgee. No man can transfer a greater right than he himself has." *Jacquet vs. His Creditors*, 38 Ann. 864.

" The obligation of pledge is contractual. It vests in the creditor the right of possession and of privilege on the thing pledged. The right of detention being as much a part of the security as the thing pledged are a part of the guaranty, the creditor cannot be deprived of same by the voluntary act (bankruptcy) of his debtor, nor by the insolvent laws of the State. The obligations or contracts cannot be impaired. *Id.*

" Notwithstanding the pledgor's insolvency, the pledgee can proceed to sell the pledge in the way stipulated by the contract." *Id.*

" A power of attorney, coupled with an interest, is not revoked by the death or bankruptcy of the principal. Article 3027 of the Civil Code applies to a gratuitous mandate." *Id.*

Act No. 19 of 1882 does not affect the above stated rights of a pledgee under a contract of pledge conferring the right to sell.

For, 1. It is simply an amendment of Article 3027, C. C., which this Court, in the case of *Jacquet vs. His Creditors*, held to apply only to gratuitous mandates.

2. It does not expressly repeal prior laws which gave to the pledgee of any kind of property, including shares of stock, the right to sell according to the stipulation of the contract, notwithstanding the insolvency of the pledgor. It does not repeal these laws by implication, for the continued existence of the mandate to transfer shares of stock is not at all incompatible or inconsistent with the continued existence of the power to retain and sell pledged stock after the failure of the pledgor.

3. It is not reasonable to presume that the Legislature intended to put pledgees of shares of stock in *duriori casu* than pledgees of all other kinds of property, especially when this particular species of property is, by reason of its negotiable character, the most usual form of security, and the necessities and conveniences of commerce require that the power to realize on such collaterals should be as free and untrammelled as possible.

4. In this case the pledgee's right to retain and sell the pledged stock does not depend upon the power to transfer stock. It is conferred by the contract of pledge. The separate power to transfer given by the pledgor is not necessary to the existence or exercise of the right to retain or sell, stipulated in the contract of pledge.

The opinion of the Court was delivered by

FENNER, J. This is a proceeding by the syndic in this insolvency to compel the Sun Mutual Insurance Company and the Hope Insurance Company to surrender to him certain shares of stock in various corporations which belonged to the insolvent, and had been pledged to said companies before his cession to secure certain debts due by him to them.

The validity of neither the debts nor the pledges is assailed by the

Renshaw vs. His Creditors.

syndic, nor is it even pretended that the value of the securities exceeds the debts for which they are pledged.

The simple contention is that, by virtue of the cession, the syndic is entitled to take the pledged property from the possession of the pledgees and to administer and dispose of the same and to distribute the proceeds according to law.

It appears that at the time of the pledges, the insolvent executed powers of attorney in favor of the pledgees, authorizing them, in case of the non-payment of the debts at maturity, to sell the pledged stocks at public or private sale, and to make all necessary transfers thereof.

The syndic bases his proceeding upon the claim that under act 19 of 1882, amending article 3027 Rev. C. C., the powers of attorney to transfer the said stocks are revoked.

The article, as amended, reads as follows :

C. C. 3027, "The procuration expires :

"

"

"

" By the death, seclusion, interdiction or FAILURE of the agent or " principal."

" But powers of attorney by public act or by writings under private " signature, or by letter to transfer on the books of stock corporations, " bonds or shares of stock in said corporations, shall be irrevocable, and " shall not expire by the death, seclusion, interdiction or failure of the " principal, WHERE THE SAID BONDS OR SHARES OF STOCK HAVE BEEN " PREVIOUSLY SOLD TO THE PERSONS HOLDING THE SAID POWERS OF " ATTORNEY, FOR VALUE RECEIVED AND SAID FACTS ARE SET FORTH IN " SUCH POWERS OF ATTORNEY."

From this last clause the syndic infers that, on the principle *inclusio unius exclusio alterius*, powers of attorney to transfer shares of stock which have not been "previously sold to the persons holding the powers," are revocable, and expire on the cession of the principal.

The principle invoked, if applied, would go much further, and would involve the revocation of all other powers of attorney whatever by the causes stated save the single exception mentioned.

In a recent case we held that art. 3027 only applied to gratuitous mandates, and not to mandates coupled with an interest like the mandate to sell given to the pledgee as a condition and integral part of the contract of pledge itself. *Jacquet vs. Creditors*, 38 Ann. 864.

In that case, however, our attention was not called to the act of 1882,

Renshaw vs. His Creditors.

and we must admit that, lurking in the statutes of that year, it escaped our notice. After due consideration of the amendment, however, we are inclined to adhere to the opinion in the Jacquet case.

The article 3027, as it stood before the amendment, was copied from article 2003 of the Code Napoleon, and was a principle equally of the Roman law and of universal jurisprudence. It has been universally held that it did not apply to what, at common law, are known as "powers coupled with an interest" corresponding to those which, in the terminology of the Roman law, made the mandatary a "*procurator in rem suam*." Hunt vs. Rousmanier, 8 Wheat. 174; Story on Agency, §§ 164, 173, 477, 483, 489; Livermore on Agency, § 30; 3 Zachariae, p. 134; 18 Duranton, No. 284; Troplong, Mandat, No. 728, 737.

Thus the French Court of Cassation held that a mandate conferred in the interest of the agent as well as of the principal, and as a condition of a contract passed between them, is essentially irrevocable, and is not revoked by the failure of the principal. Journal du Palais, 12 and 19 August, 1831.

The same principle applies in every case where the mandate is granted as a condition of the contract, or as a means of executing it. In such case the mandate, forming an element of a synallagmatic contract, is impressed with the qualities of such a contract, and is irrevocable. 2 Delamarre & LePoitvin, No. 445; Troplong No. 737; Journal du Palais, 7 July 1837.

The principle is so just and conservative and so essential in the business transactions of life, that it is impossible to believe that the Legislature intended to abolish it or to confine its application to a single case.

The principle *inclusio unius exclusio alterius*, is, after all, only one of many rules of interpretation, not intrinsically obligatory, but only serving as aids in arriving at the legislative will.

We consider that as art. 3027 stood, prior to the amendment of 1882, jurisprudence exempted such mandates as we have just referred to as conclusively as if the exception had been written in the statute. The question is whether the Legislature intended to alter or repeal this exception. The statute does not express such intention, and we are only asked to infer it by implication under a particular rule of statutory construction. But this rule clashes, in this case, with another of equal force, viz: That which republishes the constructive repeal of laws by implication in any case except where the new statute and the old are so inconsistent that they cannot stand together. N. O. & Carrollton R. R. vs. City, 34 Ann. 441.

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No such inconsistency exists here.

We are satisfied that the Legislature only intended, out of excessive caution, to give the sanction of express law to the particular exemption from revocability mentioned in the amendment without interfering with any other exemptions which jurisprudence had always recognized.

It is plain that the powers of attorney here involved belong to the class which we have described, forming important adjuncts of the contracts of pledge themselves and stipulated in the interest of the mandatories; that the mandator had no power to revoke them, and hence they were equally irrevocable for the other causes mentioned in art. 3027.

We may add that, even if the powers of attorney were revoked, that would not deprive the pledgees of the protection accorded them by art. 3164 R. C. C., which declares: "The creditor who is in possession of the pledge, can only be compelled to return it, when he has received the whole payment of the principal as well as the interest and costs."

This right of retention is an essential constituent of the *jus pignoris*.

It has been held that this right is not operative, as against creditors of the pledgor, to prevent them from seizing and selling the pledged property so as to liquidate the debt and secure any possible surplus. Kirkpatrick vs. Oldham, 38 Ann. 553; Augé vs. Variol, 31 Ann. 868; Pickens vs. Webster, Id. 870; Case vs. Kleppenburg, 27 Ann. 484; Gleises vs. McHatton, 14 Ann. 560.

No doubt the syndic of an insolvent pledgor might, on proper showing, and by proper proceeding, force a similar liquidation so as to secure any possible *residuum* for the creditors, as was done by the decree of the court in the case of Brother vs. Saul, 11 Ann. 225.

But it is entirely inconsistent with the pledgee's right of retention and has never been held in this State that, by mere virtue of the cession, the syndic acquires the right to demand the surrender of pledged property to be officially administered by him and subjected to the costs and burdens of such administration.

Judgment affirmed.

No. 10,015.

CITY OF NEW ORLEANS VS. THE GREAT SOUTHERN TELEPHONE AND TELEGRAPH COMPANY.

An annual charge of \$5 per pole upon the poles of a telephone company already established imposed by a municipal ordinance as "a consideration for the privilege" is not a tax either on property or as a license and cannot be sustained as an exercise of the taxing-power.

40	41
45	608
40	41
46	529
40	41
49	539
49	550
49	561

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It is not an exercise of the police power, as it involves no consideration of public order, health, morals or convenience.

A municipal ordinance granting to a particular company, authority to construct and maintain telephone lines on the streets, without any limitation as to time and for consideration stipulated, when accepted and acted on by the grantee by a compliance with all its conditions and the construction of a valuable and expensive plant, acquires thereby the features of a contract which the city cannot thereafter abolish or alter in its essential terms without the consent of the grantee; and the imposition of new and burdensome considerations is a violation thereof.

A proviso in the ordinance to the effect that "the acts and doings of the company under this ordinance shall be subject to any ordinance or ordinances that may be hereafter passed by the city," does not convert the grant into a mere revocable permit. On the contrary' it assumes that the ordinance is to continue in full force and effect, and recognizes the right of the grantee to do and to act under and in accordance with it, and only subjects such "acts and doings" to future municipal regulations not inconsistent with the ordinance itself.

A PPEAL from the Civil District Court, for the Parish of Orleans.
Voorhies, J.

Walter H. Rogers, City Attorney, and Branch K. Miller, Assistant City Attorney, for Plaintiff and Appellant.

Bayne, Denegre & Bayne, for Defendant and Appellee.

The opinion of the Court was delivered by

FENNER, J. The defendant is the assignee and successor of the New Orleans Telephonic Exchange referred to in the following ordinance of the city of New Orleans, adopted February 18, 1879:

An ordinance authorizing the construction and maintenance of a telephonic telegraph line through the streets of the City of New Orleans.

SECTION 1. Be it ordained by the City Council of the City of New Orleans, That the New Orleans Telephonic Exchange is hereby authorized to construct and maintain a line or lines of telegraphs through the streets of this city, the line or lines to be constructed along such streets, at such points, and in such manner as to the kind and position of the telegraph poles, the height of the wires above the streets, and in all other particulars, as the Administrator of the Department of Improvements of this city may direct.

Provided, however, that the said company shall connect their wires with the Mayor's office, Chief of Police's office, and fire alarm telegraph office, and place and keep telephones therein free of charge to the city, so that said telephones may be used in connection with all wires under the control of said company.

SEC. 2. And be it further ordained, etc., That all the acts and

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doings of said company under this ordinance shall be subject to any ordinance or ordinances that may hereafter be passed by the City Council concerning the same.

Under this ordinance defendant constructed and has since maintained telephonic lines through the streets, built according to the directions of the Administrator of Improvements, and with his approval, and has furnished the city with the free telephonic service stipulated, and has complied in all respects with the terms of the ordinance.

The plant established by defendant is expensive and valuable. The defendant pays a tax upon this plant as property, and also pays a license tax levied on its business.

In April, 1880, the General Assembly of the State passed Act No. 124, authorizing corporations formed for the purpose of transmitting intelligence by magnetic telegraph or telephone, to "construct and maintain telegraph, telephone and other lines along all State, parish or public roads or public works, and along and parallel to any of the railroads in the State, and along and over the waters of the State; provided that the ordinary use of such roads, works, railroads and waters be not thereby obstructed, *and along the streets of any city, with the consent of the Council or Trustees thereof.*

The defendant having the prior consent of the city certainly came under the protection of this act as to the maintenance of its lines from the date of its passage.

In December, 1883, the City Council passed an ordinance to regulate and control the erection and maintenance of poles for supporting wires of the telephones within and on the streets, ways and public places of the city of New Orleans, "containing various provisions on the general subject, with none of which have we any present concern except the following: That "no poles shall be allowed to be erected, *or any existing poles be allowed to remain* in that portion of the city embraced by Jackson street, Elysian Fields, Roman street, and the Mississippi River, *except upon the payment of \$5 per annum per pole for every such pole erected, or at present in use* within that section of the city * * * said payments to be *in consideration of the privilege and advantage of entering upon, using and permanently occupying the streets, ways and places of the city for private property,* and to be paid annually in advance, commencing January 1, 1884."

Defendant had 600 poles within the section designated, on which the sum of \$3000 is claimed to be due, and the object of the present

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action is to enjoin defendant from using or maintaining said poles for telephonic purposes, until payment thereof be made.

It is not pretended that the exaction claimed is a tax, either on property or as a license, or that it is an exercise of the taxing power in any respect.

The ordinance qualifies it as a price or consideration for the privileges enjoyed. It is not even alleged that defendant has ever consented or contracted to pay such consideration, and the attempt made to prove such consent was not only *ultra petitionem*, but the evidence offered for the purpose was manifestly insufficient and illegal, and was properly rejected.

There is, therefore, entire absence of any legal tie binding the defendant as a debtor for the amount claimed, and if the city were suing simply for a money judgment, the petition would set forth no cause of action.

The real relief claimed by the city, however, is found in the injunction prayed for, based on the theory that the provision of the ordinance referred to is a regulation or condition imposed upon the maintenance of the poles and exercise of the privileges which the city had the right to impose, and without compliance with which the defendant could not lawfully continue to maintain and exercise them.

The question for our determination is whether the city had the right to make such a regulation or impose such condition.

It is not seriously contended that the provision is a police regulation, and, indeed, such contention is silenced not only by the nature, but by the express terms of the provision itself, which qualify the exaction as a "consideration for the privilege." No consideration whatever of public morals, health or convenience is involved. It is not proposed to abolish the use of poles or to alter their location, construction or manner of use in any way, to subserve the public comfort. The simple requirement is the payment of a price, on payment of which the *status quo* continues, while, without such payment, it must cease. The case presents no feature of an exercise of the police power.

The only remaining question is, whether, after granting the defendant the authority to construct and to maintain its lines without limitation as to time, and with no other consideration than the furnishing of certain free telephonic facilities to the city; after the defendant has, at great expense, established its plant, and constructed its lines, and when it has fully complied with all the conditions imposed, the city can now exact this large additional consideration for the continued enjoyment of privileges already granted.

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If the city can do this now, she could have done it the very day after the defendant had completed its lines, when it had incurred all the expense and before it had reaped a particle of return. If she can impose a charge of \$5 per pole, she can, with equal power, impose one of \$1000. and, for that matter, she could arbitrarily revoke the grant at her pleasure.

Either she is bound according to the terms of her proposition accepted and acted on by defendant or she is not bound at all.

Obviously, upon the clearest considerations of law and justice, the grant of authority to defendant when accepted and acted upon, became an irrevocable contract, and the city is powerless to set it aside or to interpolate new and more onerous considerations therein. Such has been the well recognized doctrine of the authorities since the Dartmouth College case, 4 Wheat. 518.

The main contention of the city, however, is that the second section of the ordinance robs it of the features of a contract and converts the authority granted into a mere revocable permit. The section is as follows: "That all the *acts and doings* of said company *under this ordinance* shall be subject to any ordinance or ordinances that may hereafter be passed by the City Council concerning the same."

The city's construction of this section is strained and unreasonable and conforms neither to its spirit or letter.

It is not conceivable that the grantee would have invested its means in such an enterprise, had it imagined that the term and conditions of its enjoyment of the privilege lay at the entire mercy of the city. If any such unreasonable intention lurked in the minds of the Council which passed the ordinance, the grantor, under familiar rules of construction, came under the obligation of expressing it clearly and unambiguously.

But what is it that is subject to regulation and control by future ordinances?

It is, "*the acts and doings of said company under this ordinance.*" This assumes that the ordinance itself is to continue in full force and effect, and certainly reserves no power to repeal, destroy or alter it in any of its essential features and considerations. It recognizes the right of the company to act and to do under and according to the ordinance, only subjecting such "*acts and doings*" to municipal regulations not conflicting with the ordinance itself.

We consider that the imposition of the additional and burdensome consideration here involved is not within the scope of the rights reserved.

Judgment affirmed.

Dwyer vs. Woulfe et als.

No. 10021.

WIDOW PATRICK DWYER VS. JAMES J. WOULFE, ET ALS.

A suit for hypothetical damages, not yet sustained and which may never be suffered, cannot be countenanced.

In a suit against the succession and the surety of a notary, to hold them liable on account of the latter's failure to register seasonably an act of mortgage, another act having been in the meantime recorded, cannot be sustained, when it is not alleged that the property has proved insufficient to pay the claims, or that the drawer of the note and the succession of the notary are insolvent: that the debt has not been paid, in whole or in part, and that injury has been suffered.

It is not until such facts are alleged and proved and the dereliction of duty by the notary is established that damages, like those claimed, can be recovered.

A PPEAL from the Civil District Court for the Parish of Orleans;
Righthor, J.

Posey & Ker, for Plaintiff and Appellant.

Breaux & Hall, James Timony and Sam. L. Gilmore, for Defendants and Appellees.

The opinion of the Court was delivered by

BERMUDEZ, C. J. Plaintiff appeals from a judgment dismissing her suit on exceptions of prematurity, misjoinder and no cause of action.

The petitioner sets forth that on the 24th of October, 1884, she loaned Woulfe \$5000, for which he issued his note, securing it by mortgage on certain real estate before Castell, notary; that said act was not recorded by the latter until the 24th November, 1885; that in the meantime said Woulfe secured another loan for \$1500 by mortgage, on the same property, by act before the same notary, which was recorded on the 30th of October, 1885.

She avers that, in consequence of the failure of the notary to record her act without delay in the mortgage office, she *may* suffer damages to the extent of \$5000, for which the drawer of the note, the succession of the notary and the surety of that official, are jointly and severally bound to her. She cites them and asks for judgment accordingly. To this petition, the exceptions mentioned were filed and sustained.

The plaintiff has already recovered judgment against Woulfe, the drawer. She does not allege that execution has been issued and returned *nulla bona* against him; or that the succession of Castell is insolvent, and that, in consequence, the surety on the latter's bond has become liable to her, for the amount of her note and that she has really suffered the injury.

Suing in advance for *hypothetical* damages which, as an abstract

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proposition, may never be sustained, cannot be countenanced; courts have enough to deal with actual wrongs.

It will be ample time for the plaintiff to revindicate what rights she may have, when the property mortgaged shall have been sold and shall have failed to realize sufficiently to satisfy, in part or in whole, the judgment on the note, and eventually when the succession of the notary will be shown to be insolvent and execution returned unsatisfied against the drawee of the note.

On the assumption of the notary's liability, it is only, if the property does not satisfy the debt, or the drawer of the note and the succession of the notary fail to pay it, that the surety on the latter's official bond can be called upon for indemnity, under the terms of the obligation which he has signed. R. S. 354.

There is surely no cause of action shown against the drawer of the note, who has already been condemned to pay it.

Judgment affirmed.

No. 10,041.

GABRIEL RAWITZKY VS. LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

40	47
1105	399
40	47
115	770

A railroad company is not responsible in damages for ejecting a passenger on the ground that the ticket which he tenders for his fare had expired by limitation under its very terms, at the time that it was tendered.

A stipulation in a ticket sold as good for thirty days, that the purchaser shall have himself identified as such at the terminal point of his journey, and that the ticket shall be good fifteen days only after date of identification, is not illegal or unreasonable, but is binding on the party who thus contracts with the company.

A party suing on such a contract, and alleging the same will not be allowed by parol to prove a different contract.

A PPEAL from the Civil District Court for the Parish of Orleans;
Rightor, J.

Leonard, Marks & Bruenn, for Plaintiff and Appellee :

1. Parol evidence to show statements of company's regular ticket agent is admissible. 2 Lea (Tenn.) 594; 76 Penna. 66; 63 Me. 298, 302.
2. Representations concerning rights under ticket made by agent are within the scope of his authority and the company is bound by them. 10 Neb. 250; 11 Fed. Rep. 698.
3. Actual as well as exemplary damages will be allowed for wrongful expulsion from railway train, and courts are to take into consideration the humiliation to personal feelings, the degradation, as well as the loss occasioned by such expulsion and resulting therefrom. 19 Ohio St. 157; 68 Mo. 329; 79 Ill. 584; 55 Ill., 185; 46 Tex. 272; 90 Ill. 126.
4. The carrier is bound to make good what the ticket imports on its face, and the passen-

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ger is not bound by any rule or usage of the company, not positively shown to have been made known to him. 47 N. Y. Sup. (Jones & S.) 282.

5. The damage caused by the unwarranted expulsion of plaintiff, shown to have resulted in the destruction of his entire business and credit, and the judgment of the lower court should be affirmed.

Bayne, Denegre & Bayne, for Defendant and Appellant:

The opinion of the Court was delivered by

POCHÉ, J. Plaintiff claims damages in the sum of ten thousand dollars on the ground that he was illegally and wrongfully ejected from one of the defendant company's trains on which he was a passenger.

The defence is substantially that the ticket which plaintiff tendered to the conductor for his fare had expired by limitation under the very terms stipulated therein, as accepted by plaintiff under his signature; and that when called on to pay his fare as an ordinary passenger, plaintiff had refused compliance, preferring to leave the train at a way station.

Defendant appeals from a judgment of \$5,000 in favor of plaintiff.

The facts, as we gather them from the preponderance of the evidence, are as follows:

In the summer of 1886, the defendant company offered for sale tickets to go from New Orleans to Toronto, Canada, and return, at the reduced rate of \$42 for the round trip, good from the first of June to the 31st of October of that year; and at the same time offered tickets for the same trip good for thirty days from the date of purchase, at the still further reduced rate of \$26 75. On the 8th of July plaintiff bought a ticket of the latter description, and left for his journey on the same day. Written lengthways on the face of his ticket, in red ink, were the words: "Limited to August 8, 1886"; and the ticket also contained the signature of the company's agent and that of plaintiff, as well as mention of the date of sale. Among numerous other conditions of the contract printed on the ticket, was the stipulation which bound the purchaser, on his departure returning, to identify himself as such by writing his name on the back of the contract in the presence of the ticket agent at the point to which the ticket was sold, and by which the purchaser agreed "that this ticket and coupons shall be good, returning, fifteen days only, after such date."

It is then shown that plaintiff was thus identified at the ticket office in Toronto on the 14th of July, and that he was ejected from the company's train at a point between Cincinnati and Louisville on the third of August of that year, under the following circumstances:

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A short time after leaving Cincinnati, on his way to New Orleans, when plaintiff was called on for his fare by the conductor in charge of the through train from Cincinnati to Louisville, Ky., plaintiff tendered the ticket herein above described, and on which he had travelled from Toronto to Buffalo, N. Y., and thence to Cincinnati, whereupon he was informed by the conductor that the ticket could no longer avail him, for the reason that under its terms, it had expired by limitation, as more than fifteen days had run from the date of identification at Toronto, July 14th, to the day on which the ticket had been tendered by plaintiff in payment of his fare. After considerable discussion, during which, plaintiff insisted that his ticket was yet good, as it was limited to August 8th, and during which he was advised by the conductor to pay his fare, about \$3 50 to Louisville, where he might make suitable arrangements at the general office of the company, at which place only, he could find an officer empowered to revive the extinct contract, offering at the same time to give him a printed receipt of the amount paid, which he might perhaps recover at that office, and on the persistent refusal of plaintiff to pay such fare, he was ejected at a way station at about an hour's run west of Cincinnati. At that point he telegraphed the facts to a friend in this city, who made necessary arrangements to secure a ticket to carry him from Louisville to New Orleans, informing him by telegraph that he would find such ticket at the company's general office in Louisville.

Plaintiff then bought a ticket to the latter point where he found his ticket for New Orleans, at which place he arrived in due time, having been detained twenty-four hours by the unpleasant incident. There is no proof or even an intimation that violence or harsh means were used in ejecting plaintiff from the train. Hence the pivotal question in the case, is to ascertain whether the company through its agent, had the legal right to conclude that by the acts of plaintiff its contract with him had expired on the third of August, thereby justifying the defendant in refusing to carry him further on the ticket which he had bought from it on the 8th of July previous. That question suggests the discussion of two propositions:

First—Whether the stipulation contained in the contract, by which a ticket sold as good for thirty days may expire before that time, by the act of the purchaser, if he happens to have himself identified at the point of terminus of his journey, more than fifteen days before the expiration of the thirty days or before the time at which he seeks to use the ticket, is in law a reasonable condition.

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Second—Whether that clause was in law and in fact a part of plaintiff's contract with the defendant company.

I.

We do not understand that plaintiff's counsel, either in their pleadings or in their argument, contest or dispute the legal and binding force and effect of the clause as part of a carrier's contract; and at this stage of railroad jurisprudence, such a contention would be of little or no avail.

All the writers on railroad law, and numerous decisions of the courts of the country, concede the right of common carriers to include such restriction in their contracts for the transportation of passengers.

Thompson on Carriers, pages 70 and seq., p. 375; Hutchinson on Carriers, §575, 581; Woods on Railroad Law, p. 1407, 1438, 1439; 37 Michigan 342, Frederick vs. Marquette, etc.; 67 Illinois, Churchhill vs. Chicago Railroad, p. 390; 54 Wisconsin, Yorton vs. Milwaukee Railroad, p. 234; Pennington vs. Philadelphia, Wilmington and Baltimore R. R. Co., American and English railroad cases, p. 310; Howard vs. Chicago, St. Louis and New Orleans R. R. Cos., American and English railroad cases, 313, same p. 345.

It appears from the record in this case that the object in requiring the identification of the purchaser, and of the limit of use of tickets after fifteen days from the date of such identification, is to check, as much as possible, any speculation or trading in tickets which are sold at greatly reduced rates. And although the compliance with such a condition entails considerable annoyance on the purchaser, it does not appear that the condition is reprobated by law, or is liable to the objection that it is unreasonable. A regulation of similar import was recently submitted to judicial test in this State, and on that occasion it was held by this court that:

"The rules of a city railroad company, acting under a contract with the city, which requires the company to carry passengers over two sections of its line for one fare, which require such passenger to keep and show, undetached by him, a coupon ticket as a voucher of his right to continue on the car beyond a given point, are reasonable in law."

In that case the company was justified for having ejected a passenger who had tendered the required voucher, but already detached, and who refused to tender an undetached voucher or to pay regular fare. A partial compliance with the rules of the company was held insufficient to entitle the passenger to continue his ride on the second section of the company's line. *De Lucas vs. Railroad Company*, 38 Ann. 930 and authorities cited therein.

We therefore hold that the stipulation contained in a ticket, by which the use of the same is restricted to fifteen days after the identification of the original purchaser at the terminus of his journey, as evidenced by the ticket in this case, is binding on such purchaser. As a part of the contract it must be enforced, and a refusal of compliance by the purchaser exposes him to be ejected from the company's trains or cars.

"A party who refuses to comply with the mode of paying his fare as agreed upon between himself and the carrier is under the same condition of one who refuses absolutely to pay any fare at all; and hence, the only alternative is to carry him for nothing, or to eject him if he refuses to leave when requested so to do." *De Lucas' case*, 38 Ann. 933.

But plaintiff's contention is that the clause was not a part of his agreement with the company, and this leads us to the consideration of the second point of discussion.

II.

According to the views taken of their case by plaintiff's counsel, that contention is the crucial text of the controversy, for, as we have already said, they do not put directly at issue the right of a common carrier to incorporate such a condition in a contract of transportation.

Plaintiff's point is that the clause in question was intended as a part of the contract under the company's original plan or scheme, which consisted in selling tickets to Toronto and return at the rate of \$42 for the round trip, and good from the date of purchase, which could be June the first to the 31st of October following, and that although, for convenience sake, the printed form of tickets under said original scheme, was used to evidence his contract with the company, the clause in question was not a part of his obligations under his contract, which came under a special and a different scheme, by means of which all tickets sold were good for thirty days independently of the date of identification at the terminal point of the journey. But the argument is not sustained by the record. Under a proper construction of his own pleadings, plaintiff is estopped from urging that contention.

For there he in terms admits that the clause in question was a part of his contract.

His petition contains the following unambiguous averment:

"Your petitioner represents that after his arrival at the said Toronto, Ontario, he being desirous of returning to the said city of New Orleans, petitioner repaired to the ticket office of the Grand Trunk Rail-

way, as in his said ticket directed, and as under his contract with the said Louisville and Nashville Railroad Company he was bound to do, and then and there identified himself as the original purchaser of the said ticket issued to him as above set forth, signed his name in his proper hand-writing, and which signature was witnessed by the said ticket agent at said Toronto, who also signed his name below that of petitioner, all of which more fully appears from the said ticket hereto annexed as part hereof."

Now, from an inspection of the ticket it appears as hereinabove stated, that the requirement of identification is a part of the clause which limits the validity of the ticket to fifteen days after the date of identification, and that it appears nowhere else in the contract. By what rule of law or of pleading can plaintiff claim the right to recognize a portion of a clause in a written contract, bearing his signature, without restriction or qualification, and to repudiate the other portion of the same clause, and contained in the same sentence? Parties litigants must be bound by their pleadings.

An effort was made to show, by parol testimony, that the contract as printed, had been modified by the company's agent, who sold the ticket, so as to strip it of the obligation on the part of the purchaser to use the ticket within fifteen days after identification, and evidence was admitted to that purpose, over defendant's objections. The evidence should have been rejected under the effect of plaintiff's own pleadings as hereinabove stated. But, even if admissible, the testimony on that point is not sufficient to sustain the contention.

The true construction of the ticket bought by plaintiff on July 8, 1886, as applicable to this issue, is that the ticket was good for his fare to Toronto and return until the 8th of August following, on condition that he should be identified as the original purchaser at Toronto, and that, having been identified on the 14th of July, he should have completed his return trip, on or before the 29th of July, or that to be entitled to use the ticket as late as the 8th of August, he should have been identified only fifteen days before that date.

We are satisfied that plaintiff was in good faith, and that his misfortune can be attributable only to his failure to properly understand all the conditions stipulated in the contract. He admits that he had never read those conditions before he was ejected from the train on the 3d of August.

The whole trouble, as we gather from his testimony, was that Toronto was not the objective point of his journey, and that his sole purpose in visiting that city was to be identified by the agent of the

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company at that place, in compliance with the stipulation to that effect in the contract.

His trip was intended to visit friends and relatives at Buffalo, New York, where he sojourned from the 15th of July to the 2d of August.

He must, therefore, be held in law as responsible for all the troubles which befell him on the occasion which is the subject-matter of this litigation.

It is doubtless a hard case on him, and he must have suffered great annoyance and humiliation at being ejected from a train on which he believed he was entitled to all the privileges of a passenger.

But under the evidence in the case, and in keeping with well-settled jurisprudence, we have no authority to inflict damages on the corporation, as it violated no part of its contract.

It is, therefore, ordered, adjudged and decreed, that the judgment appealed from be annulled, avoided and reversed, and that there be judgment in favor of defendant rejecting plaintiff's demand, and dismissing his action at his costs in both courts.

No. 9891.

EDWARD C. HANCOCK VS. ELIZA JANE HOLBROOK ET AL.

The right to avoid titles to property on the ground of fraud must be exercised within a reasonable time after discovery, especially where the property is of fluctuating value dependent upon successful administration: the party cannot await the event, and then claim the profit.

The institution of a suit not prosecuted may save the action from this equitable bar, but the plaintiff's neglect of his duties as director, failure to interpose for the prevention of the transactions while they were, to his knowledge, in course of consummation, and his inaction until the death of the principal actor, whose title he attacks, subject his claims to scrutiny and adds to the burden of proof resting on him.

The stockholders of a corporation, in the name of which property has been bought on credit, cannot form a new corporation in which their interests are the same as in the old and based on no new consideration, and by transferring the property to the new corporation escape liability to the vendor and creditors at least to the value of the property.

The acceptance of the surety on a twelve months' bond of the assumption of a third person to hold him harmless, does not deprive him of his recourse against the principal of the bond or the property for the price of which the bond was given, when the assumption is not discharged and the surety has paid the bond.

The board of directors of a corporation have the general right to apply its property to the payment of its debts: and a majority of stockholders present, at a meeting regularly convened, with due notice for the purpose, have the right to ratify such action and dissolve the corporation.

But where such action is had through the influence of the president of the corporation, and where the debt to which the property is applied is one for which he is primarily liable and especially when he has subsequently acquired the property, such circumstances sub-

40	53
44	26

40	53
106	177

40	53
116	821

40	53
119	432

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ject his action to severe scrutiny and require of him proof that he acted with candor and fair dealing for the interest of the corporation and without any taint of selfish motive.

The above test is applied to the action of Holbrook, the assignor of defendants, and it is found to stand the ordeal.

Transactions which only accomplish justice, which are done in good faith and operate no legal injury, lack the characteristics of fraud.

Judgment affirmed.

A PPEAL from the Civil District Court for the Parish of Orleans;
Tissot, J.

Rouse & Grant for Plaintiff and Appellant:

1. The directors of a body corporate are trustees, and the stockholders are the *cestui que trust*, and have a joint interest in all the property and effects of the corporation. *Jackson vs. Ludeling*, 21 Wall. 616; *Koehler vs. Iron Co.*, 2 Black, 715; *Drury vs. Cross*, 7 Wall. 299; *Cochran vs. Ocean Dry Dock Co.*, 30 Ann. 1366; 1 *Perry on Trusts*, Sec. 207, Note 5; *Angel & Ames on Corp.*, Sec. 312; 3 *Pomeroy Eq. Jurisp.*, Sec. 1088.
2. Trustees are incapable of purchasing the trust property themselves or of deriving any profit from it. *Gardner vs. Ogden*, 22 N. Y. 343; *Butts vs. Wood*, 37 N. Y. 319; *Railroad Company vs. Durant*, 95 U. S. 576; *Ervin vs. Oregon N. & R. Co.*, 27 Fed. Rep. 625; *Greenlaw vs. King*, 3 Beav. 49, 61; *Gibson vs. Jeyes*, 6 Ves. 278; 17 Fed. 17.
3. A purchase by the trustee of the trust property, carries fraud upon the face of it. *Michoud vs. Girod*, 4 How. 553.
4. The *cestui que trust* has a right to follow the trust property into the hands of a third person, unless he be a *bona fide* purchaser, for a valuable consideration without notice. *Oliver et al. vs. Platt*, 3 How. 333, 401; *Bank vs. Insurance Co.*, 104 U. S. 66; *Cook vs. Tullis*, 18 Wall. 341.
5. Whenever a trustee reacquires trust property, disposed of by him in breach of his trust, the trust revives, and reattaches to it in his hands. 2 *Story's Eq. Jurisp.* Sec. 1204; *Oliver et al. vs. Platt*, 3 How. 401; *Cook vs. Tullis*, 18 Wall. 341. Or the *cestui que trust* may hold the property which has been substituted for it. *Ibid.* And the rule is the same, when a party acts in a fiduciary character. *Banka vs. Insurance Co.*, 104 U. S. 68.
6. The representatives of a deceased trustee are liable to the extent of assets for a breach of trust committed by the decedent in his lifetime. 2 *Perry on Trusts* Sec. 877; *Hill on Trusts*, 250; *Hazard vs. Durant*, 19 Fed. R. 471.
7. Mrs. Holbrook, universal legatee of A. M. Holbrook, acquired the Picayune, affected with the trust. As such legatee she is also liable for the debts of the testator. *Succession of Milne*, 2 Rob. 382; C. C. 611.
8. Nicholson acquired his interest *pendente lite*, with full knowledge of the trust character of the property, and, therefore, subject to the trust. 2 *Perry on Trusts*, Secs. 810, 814, 828; *Kitchen vs. Bedford*, 13 Wall. 413.
9. Upon dissolution of a corporation, the property thereof becomes vested in its members. *Burke vs. Wall*, 29 Ann. 38; *Starke vs. Burke et al.*, 5 Ann. 740; *Citizens' Bank vs. Levee St. Cotton Press Co.*, 7 Ann. 286.
10. Where the officers', or majority stockholders' action is destructive of the corporation, or where they act for their own interest, a stockholder may himself bring suit for his protection. *Hawes vs. Oakland*, 104 U. S. 450, *Pomeroy*, Sec. 1095.
11. The surety on a twelve months' bond, who pays the same, is subrogated *only* to the creditor's rights in the bond itself. *Trent vs. Calderwood*, 2 Ann. 942; *Tardy vs. Allen*, 3 Ann. 66; *Old vs. Chambliss*, 3 Ann. 206; *Crow vs. Walsh*, 3 Ann. 541.
12. The resolatory condition can be enforced only by the vendor. *Swan vs. Gayle*, 24 Ann. 498. The parties must be the same. *Augusta Ins. Co. vs. Packwood*, 9 Ann. 75. It

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- cannot be enforced in case of movables, when they have been transferred to a third persons. *Lalance vs. Wolf*, 28 Ann. 942; *Wilmot & Co. vs. Ouachita Belle*, 32 Ann. 611.
13. The vendor's privilege upon movables continues only while in the vendee's possession. *Flint & Jones vs. Rawlings*, 20 Ann. 557; *Penn vs. Ott*, 12 Ann. 233; C. C. 3217, 3227.
 14. A party is not bound by an admission made under mistake of law. *Pearce vs. Grove*, 3 Ark. 523; 36 N. Y. 637; 92 N. Y. 218. A complainant in equity may have relief against the averment of his bill. *Finlay vs. Lyon*, 6 Cranch, 238; 19 How. 173. And will not be defeated by ambiguous language, contradictory and repugnant to precedent matter. 1 Chitty's Pl. 231; 1 Salk. 284; 13 C. B. 541.
 15. Three years possession as owner, by a just title and in good faith, is necessary to acquire title to movables by prescription. C. C. 3506; 2 Ann. 997.
 16. The precarious possessor cannot prescribe by any lapse of time. *Michoud vs. Girod*, 4 Bow. p. 149, No. 11. So in the case of mandataries. *Jackson et al. vs. Jones et al.*, 14 Ann. 230; C. C. 3441, 3489, 3510, 3514; 10 Rob. 534; 3 La. 568.
 17. As between trustee and *cestui que trust*, no lapse of times bars the action. 23 Wall. 119.

Thomas J. Semmes and Robert Mott, for Defendants and Appellees:

1. A man's own admissions are the highest evidence against him; the effect thereof cannot be destroyed or weakened by any contradicting evidence. 6 M., 280, *Delacroix vs. Prevost*.
 2. He is not allowed to dispute his judicial admission. 23 Ann. 764, 5 Ann. 22, 12 Ann. 445, 18 Ann. 140, 31 Ann. 158, 33 Ann. 1198, 35 Ann. 744, 37 Ann. 108.
 3. A judicial admission cannot be retracted to the prejudice of the adversary. 1 R. 546, 3 R. 48, 10 Ann. 542, 11 Ann. 710, 4 Ann. 416.
 4. An answer in chancery can be used by defendant as evidence for himself, in so far as it is responsive to the bill. 49 Vermont 270, 40 Ind. 126, 9 Crouch 161, 1 Dan'l. Ch. Pr. 841 [n].
 5. A deposition taken in a suit may be used in a subsequent suit between the same parties, especially if it be for the same cause of action. 1 Ann. 391, 9 R. 203.
 6. The transfer of a cause from one court to another does not affect the depositions taken in the court where it originated. 1 La. 173.
 7. An answer in chancery is equal to the testimony of any other witness. 9 Crouch 160.
 8. The surety who pays a twelve months' bond is subrogated to the rights of the payee of the bond. 16 Ann. 266, 25 Ann. 116.
 9. A person who pays a debt for another, which he is legally bound to pay, or has an interest in paying, is subrogated to all the rights of the creditor against the person for whom he has paid.
- 6 La. 479, 1 La. 410, 2 R. 434, 32 Ann. 502.

The opinion of the Court was delivered by

FENNER, J. In 1873 there existed in this city a newspaper association known as the New Orleans Herald Company, the parties mainly interested in which were H. C. Warmoth, Edward C. Hancock and Alexander Walker. They had been, for a short time, publishing an evening paper called the New Orleans Herald, which was not pecuniarily profitable, and, according to our appreciation of the weight of evidence, the company was insolvent.

The New Orleans Picayune newspaper, which in 1872 had been purchased by an association of citizens who had organized themselves into a corporation known as The New Orleans Printing and Publishing

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Company, had likewise proved a losing venture, and in the fall of 1873 had been seized by judgment creditors and was advertised for judicial sale on twelve months' bond.

A scheme was then formed between the parties interested in the Herald Company to purchase the Picayune establishment and to consolidate it with the Herald, and to make the joint enterprise a success by placing its management under the control of an experienced and able newspaper director, A. M. Holbrook, who had been connected with the Picayune in its palmy days, and had conducted it profitably.

This scheme, formed in advance, embraced *ab initio*, as we find from the evidence, all the substantial features of the proceedings which subsequently took place.

The Herald Company had neither the means nor the credit to make the purchase, but Warmoth had both and was willing to use them.

Accordingly, at the sale on December 16, 1873, the Picayune establishment was adjudicated to the Herald Company, which gave its twelve-months bond, signed by Joseph Hernandez, as surety, who signed the same at the solicitation and under the personal guaranty of Warmoth.

Immediately thereafter the Herald Company executed an act of transfer of the property to A. M. Holbrook, upon the consideration of the latter's assuming to pay the twelve-months' bond at maturity, as security for which assumption he also furnished certain collateral securities.

Contemporaneously, a new corporation was formed styled the New Orleans Printing Company, having a nominal capital of \$30,000, divided into one hundred and twenty shares, of which sixty-five shares were allotted to Holbrook, and the rest were distributed amongst the shareholders in the Herald Company in the proportions of the stock held by them respectively in the latter company. In this new corporation, thus organized, Holbrook conveyed the Picayune establishment on a consideration of \$30,000, acknowledged to have been received by him, but for which he really received nothing except the sixty-five shares of stock assigned to him.

The charter itself constituted as the first Board of Directors A. M. Holbrook, E. C. Hancock, Alex. Walker, R. W. Holbrook and P. St. Amand, the two latter being, to the knowledge and with the consent of all parties, mere representatives of A. M. Holbrook, under an assignment to them of one share each of the latter's stock, the object being to secure to Holbrook control of the management.

The charter contained the following express provision: "The

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Board of Directors shall adopt such By-Laws as may be necessary to manage the company and appoint such officers and clerks as may be required."

In execution of this power the Board of Directors, at its first meeting, adopted by-laws which Hancock claimed were in violation of an alleged verbal understanding or agreement that he and Walker were to retain the editorial control of the paper. In the conflict of the evidence as to this agreement the charter, which contains the final stipulations between the parties, must prevail.

After this first meeting Hancock, without resigning his directorship, entirely withdrew his services, and never attended any other meeting of the directors or took any concern in the conduct of the paper.

If the paper did not succeed, Hancock, who thus ignored his duties as a director and withdrew his editorial services and support, is certainly not in position to shift the blame on others.

The paper did not succeed; the title to the property was thrown in litigation by a suit attacking the sheriff's sale, brought by the former Picayune Company; the country was still suffering from the panic of 1873; the times were unpropitious; the paper made no money. The twelve-months' bond given for the price was running to maturity. Holbrook announced his inability to carry out his bargain to take it up. The collateral securities which he had furnished were of little or no value. The Herald Company had passed into the limbo of utter insolvency. It was evident that the surety, Hernandez, or his guarantor, Warmoth, would be compelled to pay the bond.

Under these circumstances, on December 14, 1874, a meeting of the Board of Directors was called, Hancock, as usual, absent, and the following resolution was adopted:

"Whereas, the twelve-months' bond for the original purchase price of the Picayune establishment, given to the sheriff in the suit of John Phelps vs. New Orleans Printing and Publishing Company, 4979, Sixth District Court, amounting to \$20,211 38, is about to become due and payable; and,

"Whereas, A. M. Holbrook is unable to pay the same; and whereas, this company has not the means to satisfy said bonds; and it is just and equitable that this company should not retain the property for which the said bond was given, to the detriment of the surety on said bond; therefore, be it

Resolved, That in case Joseph Hernandez, the surety on said bond, shall pay the same, the president of this company be and is

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hereby authorized to sell and transfer the Picayune establishment, and all its property and good will, to the said Joseph Hernandez, in satisfaction of his claim as surety on said bond."

On the following day, Hernandez, or his guarantor, Warmoth, having paid the bond, the above resolution was executed by the transfer of the property to him.

On the 22d December, 1874, in pursuance of a resolution of the directory and of notice duly given, a meeting of the stockholders of the corporation was convened, at which the following resolution was offered and adopted:

"Whereas, in pursuance of a resolution of the Board of Directors heretofore passed, A. M. Holbrook, president, has sold and delivered the Picayune newspaper establishment, good will and property to Joseph Hernandez in payment and settlement of the twelve-months' bond on which said Hernandez was surety, etc.

Resolved, That the stockholders, in meeting assembled, do hereby ratify and confirm said sale and transfer.

Resolved by the stockholders of this company, in meeting assembled, ninety-one shares out of the one hundred and one shares issued, voting therefor, that this company be now dissolved and put in liquidation, and that a commission of R. Fitzgerald and R. W. Holbrook is hereby appointed to wind up and liquidate the affairs of this corporation."

The following stockholders were represented and voted at this meeting:

A. M. Holbrook.....	63 shares.
R. W. Holbrook.	11 shares.
R. Weightman.....	8 shares.
Peter St. Amand.....	4 shares.
George Nicholson.....	3 shares.
J. A. Quintero.....	1 share.
R. Fitzgerald	1 share.

Total..... 91 shares.

Whatever may have been the origin and nature of their titles, it is not disputed that they actually represented the stock voted by them, and, even leaving out the sixty-five shares originally assigned to A. M. Holbrook as the consideration for his assumption of the bond, the remaining twenty-six shares constituted a majority of the other stock

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either actually issued or demandable, the whole of which, according to plaintiff's own admission, was only fifty-one shares.

On the same day Hernandez sold the Picayune to A. M. Holbrook individually for a consideration of \$27,000 (or as claimed by plaintiff, of \$32,000 and it matters not which), payable on long time, in small periodical notes, running over several years and secured by a pledge of the establishment.

During all the above transaction, of which he cannot and does not plead ignorance, not a word was heard from Hancock, either as stockholder or director. No other stockholder has complained. Hancock appears to have instituted some suit in January, 1875, the record of which is lost and its nature not very well explained in evidence; but it was not prosecuted and was dismissed in November, 1876, when the present suit was brought. Thus he postponed the serious judicial assertion of his claims for nearly two years, during which Holbrook, by his own skill and labor, had converted a failing, into a successful, enterprise, and had paid off a large portion of the price which he had agreed to pay, and only began it when death had placed its seal on Holbrook's lips and deprived him of the opportunity of defending his conduct.

But for the institution of the first suit plaintiff's case would undoubtedly fall under the equitable bar announced by the Supreme Court of the United States in a case similar to this, where a corporation sued to avoid a purchase of its property by one of its directors in alleged fraudulent breach of his fiduciary duties, and the Court said: "The doctrine is well settled that the option to avoid such a sale must be exercised within a reasonable time. * * * The authorities to the point of the necessity of the exercise of the right of rescinding or avoiding a transaction as soon as it may be reasonably done, after the party with whom that right is optional, is aware of the facts which give him that option, are numerous (citing them). The cases of Bliss vs. Edmondson, 8 DeG., M. and G. 787, and Pendergast vs. Norton, 1 Yon. and Call., while asserting the same general doctrine, have an especial bearing because they relate to mining property. The fluctuating character and value of this class of property is remarkably illustrated in the history of the production of mineral oils from wells. Property worth thousands to-day may be worth nothing to-morrow, and that which would to day sell for a thousand may, by natural changes of a week, or by the energy and courage of desperate enterprise, in the same time be made to yield that much every day-

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The injustice, therefore, is obvious, of permitting one holding a right to assert ownership in such property to voluntarily await the event, and then decide when the danger is over which has been at the risk of another, to come in and share the profits." *Twin-Lick Co. vs. Marbury*, 91 U. S. 587.

The doctrine is strongly applicable to property like a newspaper, whose value is not fixed, but fluctuates, according to the skill, energy and success with which its affairs are managed.

But for the success which attended Holbrook's management, we may well believe that the suit which was suffered to slumber on the records for nearly two years, and was then dismissed for reasons not explained, would never have found resurrection in the present vigorous action.

Conceding, however, that his first suit saves him from the absolute bar above indicated, yet his neglect of his duty as a director, his failure to interpose for the prevention of these transactions while they were being, to his knowledge, consummated, and his inaction until after Holbrook's death, are certainly circumstances which subject his claims to severe scrutiny and require, at his hands, the clearest discharge of the burden of proof resting on him.

Briefly stated, the gist of plaintiff's action lies in the following charges :

First—That Hernandez, as surety on the twelve months' bond, if compelled to pay it, had no claim, on that account, against either the Picayune Company or its property, but had no recourse except against the defunct Herald Company and against Holbrook individually under his assumption.

Second—That the transfer to Hernandez and the subsequent re-transfer to Holbrook individually were parts of a fraudulent scheme and conspiracy between Holbrook and other parties concerned, by which Holbrook availing himself of his control of the majority of the Board of Directors and of the majority of the stock, applied the whole property of the corporation, of which he was president, to the payment of his individual debt and then re-purchased the same in his personal capacity.

Third—That when Holbrook re-acquired the property which he had disposed of in breach of his trust, the original trust revived and he held it subject to the rights of the original stockholders in the Picayune Company; and, as such a stockholder, plaintiff, by this action,

seeks to enforce his rights in the Picayune newspaper now held by defendants.

I.

As we have already indicated, the evidence satisfies us that the purchaser at the judicial sale and the giving of the twelve months' bond in the name of the Herald Company as principal with Hernandez as surety, were parts of a plan agreed upon in advance by which the Herald Company was used simply as a vehicle by which the property was to be conveyed first to Holbrook and by him to the new corporation which was subsequently formed and which was intended *ab initio* to be the real purchaser at the sale. The new corporation was simply the Herald Company *plus* Holbrook, as evidenced by the glaring fact that its stock, except that assigned to Holbrook, was distributed without other consideration, among the Herald stockholders in exact proportion to their stock therein. The proposition that the stockholders of a corporation can buy property, in its name on credit; immediately thereafter form a new corporation in which their interests are the same and based on no new consideration; transfer the property bought to the new corporation and then hold it free from any liability to the vendor or creditors, is one which cannot be sustained in reason or by authority.

It is perfectly plain that the new Picayune Company, *quoad* this property, stood in the shoes of the Herald Company and was bound for the latter's debt to the extent of its value. *Hibernia vs. St. Louis*, 13 Fed. Rep. 516; *Horner vs. Carter*, 11 id. 362.

II.

Although Hernandez, or his guarantor, Warmoth, accepted Holbrook's assumption to pay the twelve months bond, it is not shown that he consented or intended thereby to waive his recourse against the property, in case Holbrook should fail to carry out his agreement and he should be compelled to take up the bond. The holder of the bond was undoubtedly entitled to such recourse, and when the surety paid he was subrogated to the right. *C. C. 2161; Cox vs. Baldwin*, 1 La. 410; *Baldwin vs. Thompson*, 6 La. 479; *Howe vs. Frazer*, 2 Rob. 424, *Hennen vs. Word*, 16 Ann. 266; *Suc. Hitzler*, 25 Ann. 116.

III.

From the foregoing it follows that in declaring in their first resolutions, that "it is just and equitable that this company should not retain the property for which said bond was given to the detriment of the surety on the bond," the Board or Directors recognized not merely an equitable but a strict legal obligation of the corporation."

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Indeed, plaintiff himself, in his own petition herein, distinctly declares "that, in equity and good conscience * * the said New Orleans Picayune Printing Company owed to the said Joseph Hernandez, or his legal assigns, the amount which he paid for the discharge of the twelve months' bond aforesaid, upon which he was surety, as aforesaid, but which was primarily the debt in equity and good conscience of the Picayune Company, as the successor of the Herald Company, which was legally the principal on said bond."

The attempt of plaintiff to withdraw this judicial admission on the plea that it was made in error of law, need not be discussed, being sufficiently disposed of by our own finding that it was not an error of law.

IV.

As a strictly legal question, the right of a board of directors of a corporation to apply its property to the payment of its debts, and the right of a majority of stockholders present at a meeting called for the purpose to ratify such action and to dissolve the corporation, cannot be questioned.

But where such action is taken at the instance, and through the influence of the president of the corporation, and where the debt to which the property is applied is one for which he is himself primarily liable, and especially where he subsequently acquires, in his personal right, the property thus disposed of, such circumstances undoubtedly subject his acts to severe scrutiny, and oblige him to establish that he acted with the utmost candor and fair-dealing for the interest of the corporation, and without taint of selfish motive. *Twin-Lick vs. Marbury*, 91 U. S. 590.

We have subjected Holbrook's conduct to this test, and, under the evidence, we believe it has safely emerged from the ordeal.

He had done the best that he could to make the enterprise a success and had failed. The corporation, undoubtedly was without means, other than this property, to meet the obligation.

We are satisfied that Holbrook was really unable to carry out his assumption to pay the bond and that the collaterals which he had given were worthless.

It was evident that the corporation was bound, in law and equity, to protect the surety on the bond, and that there was no other available resource for his protection, except the property which the corporation held without a dollar of consideration, and which the surety was bound to pay for.

Notwithstanding the variance in the estimates we believe the prop-

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erty was not worth more than the amount of the bond. It had not materially increased in value since the judicial sale. If seized by the surety and sold, it would not have brought more. At all events, no one was willing to give more. The surety wanted nothing but payment of his bond. The opportunity of taking the property for the amount of the bond was offered to others and was open to plaintiff or any of his friends. Negotiations failed and no purchaser could be found.

Under such circumstances the transfer of the property in satisfaction of the bond and the dissolution of the corporation seem to us to have been the prudent and only feasible solution of its difficulties.

This is not weakened by the fact that Holbrook subsequently purchased for a larger price. That was a mere speculative venture, having no basis except in the hope of a profitable conduct of the business. Holbrook's notes, though for a larger amount, were not intrinsically worth as much as the amount of the bond. They were only accepted after failure of all efforts to find any one who would pay for the property the amount of the bond.

Holbrook was a newspaper man, anxious to find employment. Hernandez (or Warmoth) found himself in possession of a newspaper which was an elephant on his hands. The emergency required prompt action and the contract entered into was a natural one on both sides.

We fail to discover any fraudulent intent or combination in these proceedings, or any injury resulting to plaintiff or other stockholders therefrom.

They have nothing to complain of except the failure of Holbrook to discharge his assumption of the bond, but that only made the corporation his creditor for the amount thereof and possibly for such damages as his default occasioned, and no such claims are urged in this suit.

Transactions which only accomplish justice, which are done in good faith and operate legal injury to no one, lack the characteristics of fraud and are not to be upset because the relations of the parties give rise to suspicions which are fully cleared away.

This case has been already twice judicially determined against the pretensions of plaintiff; first, by the U. S. Circuit Court, to which it was removed, and whose judgment was vacated by the decree of the Supreme Court of the United States, setting aside the removal and remanding the case to the State Court; and, next, by the learned judge *a quo*.

After a painstaking consideration, we reach the same conclusion. Judgment affirmed.

Maher vs. Railway Company.

No. 10,063.

THOMAS F. MAHER VS. LOUISVILLE, NEW ORLEANS AND TEXAS RAILWAY COMPANY.

While courts may allow even liberal compensatory damages against railway companies, in cases of gross fault and negligence on their part, resulting in severe injuries to the passengers whom they have, for due consideration, undertaken to carry safely, those corporations surely are entitled to protection against exaggerated and apparently stale claims, where the injury received or damages suffered is slight or nominal. In such instances the allowance made ought to be merely just and reasonable.

A PPEAL from the Civil District Court for the Parish of Orleans.
Voorhies, J.

W. S. Benedict for Plaintiff and Appellee.

Farrar & Kruttschnitt for Defendant and Appellant.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is a suit in damages for injuries sustained by a railway accident on June 7, 1885.

The allegations are that while the plaintiff, who was a passenger on the train from Baton Rouge to New Orleans, and had paid the fare, was seated in one of the coaches, the engine jumped the track, was overturned and thrown into a canal or ditch, some eighteen miles above New Orleans; that the result of this accident was such as to cause severe injuries to his body, forcing him to obtain medical assistance, to be confined to his bed for five days, to suffer great bodily pain and otherwise cause him severe injury; that he suffered from contusions, which he continues to resent, to his spinal column, recurring at periodical times, with great pain, forcing him to cease from his work; that he was, at that date, occupying a position at a salary of \$1200 *per annum*; that before he could report for duty he had to use appliances, and that he did so for thirty days; that the accident occurred by the gross fault and negligence of the Railway Company, etc.

He therefore prays for \$5000 damages.

The defense is a general denial and averment of non-liability.

From a judgment of \$750 the defendant appeals.

The accident is established and negligence, some way or other, is the evident cause of it. There is no dispute on this subject, but other material facts were not shown.

We have considered the testimony adduced and remain satisfied that it proves that the plaintiff was injured, suffered and is entitled to indemnity. He, however, declares himself satisfied with the finding of

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the lower Court, which he terms to be *meet* and *proper*, but the question is, whether it is such.

It is singular that the accident having occurred on June 7, 1885, the present suit was brought only on June 3, 1886, towards the end of the year following, which, had it gone by without any suit by plaintiff, would have silenced him forever.

It appears that other persons were injured by the accident; that to such as claimed just indemnity the company made satisfactory allowances; that although the plaintiff was in frequent contact with the officers of the company, since the occurrence, asking complimentary passes, which were issued to him as connected with a city paper, he never uttered a claim against the company until towards the end of the year following the occurrence.

There is evidence that a complaint was made at the time by plaintiff of an abrasion of the leg; that he threw up some blood; that he must have suffered some, but it is shown that far from needing medical aid, he declined such as was offered him on the relief train, and it is not proved that he called in any physician afterwards to assist him. There was no bone broken, smashed or disjointed, and the only remedy used was a liniment. There was otherwise no expense incurred.

The evidence is not positive that the witness was kept five days from his work. The Recorder, in whose court he occupied a position as stenographer, says that he remained absent only one day.

Persons in the habit of seeing him frequently, if not daily, have no recollection of any suspension of his work.

Nothing shows that the contusion or any other injury received has left any mark on the plaintiff which has since the accident in any manner injured his efficiency, habits or temper.

It is shown that he did not lose his position and was paid in full for the month of June, when the accident occurred.

Room is left from inference from the fact that the plaintiff declares himself satisfied with the recovery of \$750 on his claim for \$5000, and has never prayed for any increase.

While courts allow even liberal compensatory damages against railroad companies in cases of gross negligence on their part, resulting in sever injuries to passengers whom they have undertaken safely to carry for due consideration paid, those corporations surely are entitled to protection against exaggerated claims when the injury received is slight, or nominal.

Succession of Kate Townsend.

We think, however, that plaintiff is entitled to some adequate relief.

It is therefore ordered and decreed that the judgment appealed from be amended by reducing the allowance from seven hundred and fifty dollars to three hundred dollars, and that so amended, it be affirmed, the costs of appeal to be paid by plaintiff and those of the lower court by defendant.

No. 9820.

SUCCESSION OF KATE TOWNSEND.

THE STATE OF LOUISIANA VS. TROISVILLE E. SYKES.—MRS. ELLEN TULLY ET AL., INTERVENORS.

The familiar rule of jurisprudence, which authorizes, on cross-examination, the leading questions by one of the parties to the witnesses of his adversary, is not affected or modified in a case where third parties have intervened, who oppose both the plaintiff and the defendant, and where, in some features of the controversy, the plaintiff and the defendant have a point of interest in common and adverse to the intervenors. Under an issue joined between them plaintiff and defendant have the undisputed reciprocal right to cross-examine their opponent's witnesses. A motion to strike out the testimony of a witness, on the ground that by his absence or fault the witness deprived the opposite party of the opportunity to complete his cross-examination, falls within the scope of the legal discretion vested by law in trial judges, whose rulings on such points will not be disturbed on appeal unless glaringly erroneous and unjustly arbitrary. Succession of Rieger, 37 Ann. 104.

The State claimed the succession of a person who had died unmarried, leaving no known ascendants or descendants, or collateral relations, adversely to a universal legatee in possession of the estate, on the ground of the alleged incapacity and unworthiness of the legatee, whereupon an intervention was filed by third persons claiming the succession as heirs at law of the deceased; who contended that under the issues thus involved, the burden of evidence was on the State to prove that the deceased had left no heirs possibly entitled to the succession, in default of which proof the State had no interest to resist the claim of the intervenors.

Held, by the court, that the burden of evidence was on intervenors who sought to recover as heirs to prove their heirship with legal certainty, in default of which they have no standing in court to regulate the disposition of the succession property. In an alleged vacant succession the State has an interest to defeat the pretensions of parties claiming to be heirs of the deceased. The mode of proving that a person known at a certain time and place as A, was the identical person subsequently known at another place under the name of B, by showing resemblance between A and pictures taken of B, is very unreliable and absolutely unsatisfactory.

Extra judicial statements of deceased persons have always been ranked as the weakest evidence, and when reported to have been made to single witnesses, in the presence of no one else, generally disregarded.

The State as a sovereign, owes no costs in litigation before her own courts, even when cast in a civil suit. State vs. Richard Taylor, 33 Ann. 1272; State vs. Miles Taylor, 34 Ann. 978.

40	66
45	1144
40	66
45	809
40	66
125	661

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A PPEAL from the Civil District Court for the Parish of Orleans.
Houston, J.

M. J. Cunningham, Attorney General, and W. B. Sommerville and Omer Villeré for the State, Plaintiff and Appellee:

1. The law of Louisiana, like that of France, calls the State to a succession in two capacities: as heir at law and as trustee. C. C. 929; C. N. 768; C. C. 485; C. N. 539; 6 Duranton, 344, 345; 12 R. 584; 3 La. 374; 6 La. 653; 5 Rob. 9; 11 Ann. 59.
2. "The succession of persons who die without heirs, or which are not claimed by those having a right to them, belong to the State." C. C. arts. 485, 917 and 929.
3. The State is an irregular heir, and must be decreed so to be, when she comes into court and sets up her claim to a succession, and is not successfully opposed by one having a greater right than herself, and she is not required to show that there are no other heirs. 2 Moulton, Nos. 193, 194, 195, 196, 197; 9 Laurent, 250; 6 Aubry & Rau, § 639.
4. The succession of Townsend is not *vacant*, because Sykes, the instituted heir, and the State, the heir at law, both went into court and set up claims of heirship thereto. C. C. 1095; C. N. 811; 2 Moulton, 312.
5. "A succession is called vacant when no one claims it, or when all the heirs are unknown, or when all the known heirs to it have renounced it. C. C. art. 1095; 2 Moulton, No. 312, 191, 183, 196, 197; 38 Ann. 243.
6. "The funds of vacant successions or absent heirs, paid into the treasury of the State, remain in deposit until claimed by the heirs or those having a right to them." C. C. 1204; C. N. 811, 812, 813.
7. The two last cited articles have no application to this case, because two known heirs, the State and Sykes are in court claiming the succession of Townsend, which, for that reason, is not *vacant*, and the court cannot therefore order the proceeds thereof paid into the State treasury under Art. 1204, C. C.; C. N. 813; 9 Laurent, No. 250; 6 Aubry & Rau, § 639.
8. Sykes has been declared, at the instance of another heir, the State, to be unworthy to inherit from Townsend, and no known heir is before the court contesting the right of the State to inherit; therefore "in case a succession be opened in favor of a person whose existence is not known, such inheritance shall devolve exclusively on those * * * on whom the inheritance should have devolved if such person had not existed," C. C. art. 77; which, in the instant case, is the State of Louisiana. C. N. 136, 137, 138; C. C. 76; C. N. 135; 2 Laurent, 257, 202, 254; *Mortifs du Code Civil* (Discours) p. 98; 1 Marcadé, No. 464; 466; 1 Aubry & Rau, 630; 1 Moulton, 265; 2 Demolombe (Absence), 247; 1 Duranton, 555; 2 Laurent, 555; Dalloz, Vo. Absence, Nos. 504 et seq.
9. The State is claiming in her own right as heir, and not through any absent person, and art. 76, C. C., is not therefore applicable.
10. It cannot follow because Talley et als. have failed to establish their heirship that the undisputed heir, the State in this case, who is in possession, must be ousted and her heirship denied.
11. Particularly is this the case when the State went into court, asserting her right as heir, and had Sykes, the instituted heir, divested of his title, by a final judgment in her favor, declaring her to be irregular heir; and when this judgment is unappealed from or attacked in any manner by him against whom it is pronounced.
12. Courts are without authority to revise, reverse, amend, or set aside judgments which are not appealed from or attacked by those against whom they operate.
13. Intervenors, in their petition, admit the heirship of the State, and sue her as heir, setting up their claim to superior heirship based on blood relationship. It is from the judgment

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denying their claim of heirship and superiority only that they have appealed or of which they can be heard to complain.

14. Intervenor does not and cannot deny the heirship of the State, because Sykes could not have been destituted by any one except an heir. C. C. art. 974; suit for that purpose had to be instituted within one year after the commission of the act which made him unworthy to inherit. C. C. arts. 1711 and 1561; the State was within the term of prescription: the intervenors were not.
15. The public administrator did not (and could not, being dative testamentary executor), attack the testamentary disposition in favor of Sykes.
16. The Appellate Court cannot render a judgment which the court *a qua* could not render. 6 N. S. 457; Hennen *Vo.* Appeal IX (a) No. 3, p. 90.
17. The lower court was compelled to decide, under the law, that the State was an irregular heir, therefore capable of suing to destitute Sykes on the ground of unworthiness, before it could decide, under the evidence, that Sykes was unworthy, and thus deprive him of his rights as instituted heir. There has been no change in the pleadings, and this court cannot therefore render a judgment declaring the State not to be the irregular heir, because the judge *a qua* could not have rendered such a decision, and have destituted Sykes at the same time.
18. The effect of annulling and setting aside the judgment of the lower court, is to strike it with nullity in all its parts: such decree cannot be partial in its operation; and if there is no judgment Sykes has not been declared unworthy of inheriting; and the State is thus deprived of her property, a final judgment rendered by a competent court against Sykes, when Sykes is not complaining of such decree, but has fully acquiesced in its operation. Said judgment cannot be good and final against the defendant, when it is not good and final in favor of the plaintiff.
19. The effect of a judgment of non-suit is to turn plaintiff out of court and to place him as though he had never filed proceedings: 35 Ill. 396; 43 Conn. 61. It can have no possible effect on the defendant to the cause.
20. The judgment of the court declaring the State to be irregular heir cannot deprive any heir who may hereafter present himself of his rights: she holds, like any other heir put in possession of an estate, subject to any one having superior rights.
21. "The Supreme Court of Louisiana is without jurisdiction to revise a judgment in favor of one who has not himself appealed, and who has not made an answer to the appeal of his adversary." *Morris et als. vs. Cain et als.* 1 So. Rep. 797, and authorities there cited.
22. "The appellees in the instant case (Sykes and the Public Administrator) have neither joined appellants, nor answered their appeal. In so far as they are concerned, the decree of the court *a qua* must remain undisturbed." *Ib.* p. 806; *Leeds vs. Jones*, 37 Ann. 437.
23. A careful perusal of the evidence in this case is asked, in the confident assurance that your Honors will agree with the trial Judge and ourselves that Kate Townsend could not have been Bridget Cunningham; that aside from the differences in their appearances, ages, education, etc., they were so different in their nature and dispositions, as disclosed in the record, that they could not have been one person.
24. The judgment of the trial Judge on questions of fact should be affirmed unless clearly erroneous. *Hennen Vo.* Appeal IX (b) No. 1, p. 92.

Merrick & Merrick for Intervenor, Appellants.

1. The allegation in a petition that one is heir at law, and thereby demanding to be put in possession, as owner, is inconsistent with the argument that the estate is a vacant succession. And this principle applies to the State claiming to be the irregular heir, under C. C., art. 929, as well as to the husband or wife or natural children. 5 Rob. 12; 11 Ann. 62.

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And where the State, as against the public administrator, is decreed to be the heir and owner of a succession, it is no longer subject to the rules of law governing vacant estates.

2. The State like any other litigant, is bound to administer proof of its allegations. There is no law which creates presumptions in favor of the State, so as to dispense with proof.
3. Courts of justice follow the usual ordinary and probable course of events, and where a case is made out by proof, with reasonable certainty, in harmony with such ordinary course of events, the court will not, on the bare suggestion, without proof, that the unusual, uncommon and improbable might have happened, refuse to follow the former and thus give credence to the latter.

A. J. Murphy for Defendant and Appellee.

Breaux & Hall for the Public Administrator, Appellee.

The opinion of the Court was delivered by

POCHÉ, J. This litigation involves the question of the title to the property left by Kate Townsend, a noted courtesan, who died in New Orleans on the 3d of November, 1883.

At her death she left a will by notarial act, executed on the 9th of September, 1873, by which she bequeathed all her property to one Troisville E. Sykes, whom she therein instituted her universal legatee, appointing him also executor of her said will.

In December of the same year the State brought the present suit for the purpose of annulling and setting aside the will on several grounds, the principal of which was that Sykes, the universal legatee had murdered the testatrix.

Pending this litigation between the State and Sykes, which also involved the alleged right of the State to the ownership and possession of the succession property in default of heirs, a petition of intervention was filed by Mrs. Bridget Cunningham claiming to be the mother, by Mrs. Ellen Tully, claiming to be the sister, by Timothy J. Cunningham, claiming to be the brother, and by Mrs. Mary Connolly, claiming to be the niece of the deceased, and thus seeking to be recognized as her heirs at law.

Intervenors joined the State in seeking the nullity of the will, but opposed the demand of the State to be called to the succession, which they claimed as the legal heirs of the deceased.

The trial below resulted in a judgment which annulled and set aside the will of Kate Townsend, rejected the demand of intervenors, decreed the State to be the heir at law of the deceased, and entitled as such to the ownership and possession of all the property belonging to the succession. From that judgment intervenors alone have appealed, and thus the issue presented to this court is restricted to the conflicting claims urged by them and by the State.

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The claim of the State is predicated on the various articles of the Civil Code which provide in substance that the State inherits in default of relations, a surviving husband or wife, acknowledged natural children or valid donations.

Article 485 of the Code reads: "The successions of persons who die without heirs, or which are not claimed by those having a right to them, belong to the State."

Article 917 is as follows: "When the deceased has left neither lawful descendants, nor lawful ascendants, nor collateral relations, the law calls to his inheritance, either the surviving husband or wife, or his or her natural children, or the State, in the manner and order hereafter directed."

Article 929 provides that: "In defect of lawful relations, or of a surviving husband or wife, or acknowledged natural children, the succession belongs to the State."

Article 1095 reads: "A succession is called vacant when no one claims it, or when all the heirs are unknown, or when all the known heirs to it have renounced it."

Article 1204 contains the following provisions: "The funds of vacant successions or absent heirs, paid into the Treasury of the State, remain in deposit until claimed by the heirs or those having a right to them."

"These funds may be made use of, but their reimbursement is provided for and guaranteed on the faith of the State, so that the heirs, who present themselves, meet with no delay in receiving them."

And it may be noted that in this connection, Article 229 of the State Constitution proposes to make the following disposition of such funds:

"The school funds of this State shall consist of:" * * *

"5. The proceeds of vacant estates falling under the law to the State of Louisiana." Under the effect of the unappealed portion of the judgment rendered in the case, the court has no concern with the question of the existence of a valid donation as the projected testamentary donation has been annihilated, and the record suggests no inquiry under the issues to be reviewed, as to the existence or right of a surviving husband, or of lawful descendants or of natural children.

Hence the inquiry must be directed to the alleged existence, and claims of a lawful ascendant and of collateral relations.

These are the claims urged by the intervenors, who rest their right of recovering the succession on the following facts: That the true name of Kate Townsend was "Bridget Cunningham," who was born about the year 1833, in the town of "Rashina," King's county, Ireland,

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of the lawful marriage of George Cunningham, now dead, and of Bridget Mitchell, now the widow of George Cunningham, and one of the intervenors herein. That Bridget Cunningham left Ireland in the year 1849, and soon thereafter landed in the city of New York, State of New York, where she remained in the company of friends and acquaintances for the space of about one year, after which she disappeared, and was no more seen or heard of by any of the members of her family until her death in this city in November, 1883, when she was killed under the assumed name of "Kate Townsend," which name she had assumed in order to conceal her identity, by reason of the life of shame, as a prostitute, which she had led in this city for many years previous to her death.

On the part of the State, it is contended that Kate Townsend never bore the name of "Bridget Cunningham," that she has no mother, brother or sister or other collateral relations living, that she came directly from Liverpool to New Orleans in the year 1858, under the name of "Martha Wingfield" which was itself an assumed name. That at the date of her arrival here, she was not more than eighteen or nineteen years of age, and that therefore she could not have been born in or about the year 1833. It is also contended that Kate Townsend was the natural and adulterous child of a woman who died in London before the departure of her daughter, who was her only child, for this country, and that Kate Townsend never was in New York previous to her arrival in this city in the year 1858.

The trial of those issues lasted weeks in the district court, culminating in an enormous record containing nearly four thousand pages of testimony, an examination of which by this court consumed several months of time and of incessant labor.

During the progress of the trial below several hundred bills of exception were reserved from the various rulings of the district judge, by both parties, but principally by intervenors' counsel. Fortunately for the administration of justice by this court in its other business, many of those bills have been practically abandoned on appeal, and those which call for rulings here, can be classified, and thus more easily disposed of.

One of the main grounds of contention below grew out of the oft reiterated objections by intervenors' counsel to the right, claimed by counsel for the State, to propound on cross-examination leading questions to the numerous witnesses who were introduced by the defendant, Sykes. An inspection of the record shows that on some of the issues

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to be solved under the pleadings; for instance, the alleged identity of "Kate Townsend" and "Bridget Cunningham," the interests of Sykes were identical with those of the State, and on the other hand, on the issue of Sykes' alleged incapacity and unworthiness as a legatee, the interests of the State were common with those of intervenors.

In a contest between three parties, such a feature is frequently unavoidable. But such an incident did not and could not affect or destroy the nature of the issues which were clearly made out by the pleadings between the parties. Hence such a circumstance could not placate the antagonism between the State and Sykes, more than it could reconcile the differences between the State and the intervenors, or between Sykes and the latter. Hence there was no feature of the trial which could remove the mode of examining witnesses beyond the scope of the familiar rule which authorizes leading questions by one of the parties, to the witnesses introduced by his adversary in the litigation. Hence the district judge must be upheld in his rulings which conformed with these views.

The State complains of several rulings of the judge touching the mode of conducting the trial. It appears that intervenors were allowed to suspend the introduction of their testimony owing to the absence of some of their witnesses, during which interruption, Sykes and the State were required, over their objections, to present their testimony. While it is true, as contended for by the State, that this ruling favored intervenors, in so far as it resulted in informing them of the means of defence which they had to meet, yet it is clear that it was made within the legal discretion vested in all trial judges. Hence, such rulings cannot be reversed by an appellate court.

On appeal intervenors invoke a ruling on one of their numerous bills of exception, which is levelled at the ruling of the judge in denying their motion to strike out of the record the entire testimony of a Mrs. Margaret Littlefield, a witness introduced by the Defendant Sykes. The motion was predicated on the ground that the witness had failed to appear on a day fixed by the court for the purpose of being further cross-examined by intervenors' counsel, and that notwithstanding diligent search the witness could not be found in the city.

This ruling is also covered and protected by the legal discretion of the judge, and should not be disturbed unless it should appear to be glaringly erroneous and unjustly arbitrary.

A similar question was considered by this court in the case of the succession of Rieger. 37 Ann., p. 104.

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It appears in that case that while Widow Rieger was being cross-examined, after she had given testimony in her favor in her examination in chief, she complained of being sick, and at her request the cross-examination was postponed to next day, and that having persisted in absenting herself on repeated occasions on which she was to be cross-examined, the trial judge, on motion of opposite counsel, struck out her testimony. In disposing of a bill of exception reserved by her counsel to the action of the judge, this court said :

" We are not disposed to interfere with the discretion wisely vested in courts of the first instance in their rulings on such points. If the judge believed, as he had every reason to conclude, that this party, by her persistent failure to submit to a cross-examination, and by her conduct impeded the settlement of the succession which she represented, with possession of all the property, it was his duty to put an end to such a state of things. After due warning to her counsel, the judge used the most efficient means of preventing a denial of justice, and we cannot take the responsibility of disturbing his ruling."

In the instant case a recital of the circumstances under which the trial judge made his ruling will show that he did not act in an arbitrary manner.

The record discloses that the witness had no apparent or possible interest in the result of the controversy on trial, and that the testimony which she had given had a very striking and important bearing on the vital issue in the cause, between the State and intervenors. It also appears that she had been rigorously cross-examined and at great length by counsel for the State and of intervenors, her cross-examination covering over one hundred and forty pages of the record, and that in the course of her testimony she had taken occasion to state that she was actively engaged in looking for a situation as stewardess on an ocean vessel, which was her ordinary occupation. The record also shows that on a day intervening between the date on which she had been notified to appear for further cross-examination, and the day fixed for her return into court, she had appeared in court for the purpose of being identified by some of the witnesses in the case, on which occasion the attorney of Sykes, by whom she had been introduced, reminded the court and intervenors' counsel, of her previous statement touching her search for occupation as stewardess on a vessel, and suggested the propriety of resuming her cross-examination on that day. The offer was declined by counsel for intervenors, and on the day fixed for her appearance, the witness could not be found.

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Under such circumstances the judge's ruling must remain undisturbed, especially as he added that her testimony would be materially weakened by the line of conduct which she had seen fit to follow in the premises.

It may be proper to state here that in the consideration of the testimony of that witness in this opinion, those of her statements only which are corroborated in the record, have carried any weight in the scales.

It is believed that the status of this witness as thus reduced will no longer be a subject of legitimate complaint on the part of intervenors.

Although the pivotal issue in the case hinges upon a question of fact, the discussion involves at the threshold of the investigation the solution of a point of law raised by intervenors' counsel. Their proposition is that the burden of proof is on the State, whose right to recover the property is in law dependent upon positive proof of the conditions which vest the succession in the State. They assimilate the legal status of the State to a plaintiff in a petitory action, who must recover on the strength of his own title and not on the weakness of his adversary's.

This may have been true of the position of the State towards Sykes, defendant in the cause, but it is not a fair illustration of the relative position between the State and intervenors. As stated, we have no concern in the present discussion with the correctness or validity of the judgment rendered in favor of the State and against Sykes, on the issues which were tendered to the latter as defendant in the original suit. Equally with, and as much as the State, intervenors are interested in the assumed validity and binding force of that judgment. But under their pleadings intervenors have assumed the legal attitude of opposing both of the original parties to the suit. C. P. 389.

Even with the judgment which has annulled the last will and testament of Kate Townsend, the condition and groundwork of their success in recovering the property of the succession, is the alleged fact of their being respectively the lawful ascendant, and the lawful collateral relations of the deceased; and in default of proof of that fact they are defeated, and must go out of court.

In that contingency they have no standing in court for the purpose of inquiring into or discussing the rights of the State to obtain possession of the succession.

Either they are heirs-at-law as alleged by themselves, or they are not. If they are such heirs, then the case is with them, and the State goes out of Court. But if the proof fails to show with legal certainty

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that they are the lawful heirs of Kate Townsend, they are entirely out of the case, without interest in, or concern with, the eventual disposition of the property left by Kate Townsend. Towards the State they occupy precisely the legal attitude of a plaintiff in a petitory action.

Their true legal attitude in the case is tersely described by this Court in the case of the succession of Fletcher, 11 Ann. 59. In that case, one Marie Louise claimed, as an acknowledged natural child of the deceased, adversely to other claimants styling themselves the cousins of the deceased, and to the State. After rejecting the prayer of the pretended cousins, the court proceeded to investigate the conflicting claims of the State and of Marie Louise, who succeeded in proving that she was the acknowledged natural child of the deceased. Whereupon the State proposed to prove that she was an adulterous child, and as such disqualified in law from inheriting. But counsel for Marie Louise denied the right of the State to inaugurate that investigation, contending that her heirship having been established, the State was powerless to show by any extraneous evidence the existence of facts which would cut her off from the inheritance.

In passing on that contention, the court said:

"Marie Louise is not then in the posture of a defendant with a legal possession which is attacked by the State, but she is an actor seeking by proof to get herself recognized as an heir to an inheritance which cannot be given to her without establishing her heirship. * * She must therefore make out her case like other plaintiffs, and when apparently made out it is open to be rebutted. * * *

"That the State has an interest in defeating the unlawful pretensions of Marie Louise in this case is obvious, under the testimony which shows that there are no legitimate heirs or surviving wife."

Hence, it is perfectly safe to conclude in the instant case that intervenors who are seeking an inheritance as heirs-at-law, must establish their heirship. *Layre vs. Pasco*, 5 Rob. 9. Under the pleadings and according to the law, as just expounded, which governs the case, the burden is on intervenors to prove with legal certainty that Kate Townsend, whose succession they claim as her only heirs at law, was the identical "Bridget Cunningham," who was born in Rashina, King's county, Ireland, in or about the year 1833, who was the daughter of Widow Bridget Cunningham, the sister of Timothy J. Cunningham, and of Ellen Cunningham, Widow Tully, and the aunt of Mary Connolly, the four claimants herein.

As stated above, it is conceded by all parties and it appears beyond a reasonable doubt from the record that Kate Townsend never mar-

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ried and has left no descendants, legitimate or otherwise, and under the showing intervenors are entitled to her succession if they succeed in proving their alleged capacity as heirs at law.

The evidence introduced by intervenors, besides their own testimony, consists of the testimony of several witnesses who reside in Ireland, of some who reside in New York, and of others who reside in California, taken under commissions; and of the testimony of numerous witnesses who reside in this State, and in this city, whose testimony was taken in open court. From their own testimony and that of the witnesses who reside in Ireland, of those who reside in New York and in California, who all came originally from Ireland, it appears satisfactorily that there was such a person as Bridget Cunningham, who was born about the year 1833, in the town of Rashina, King's county, Ireland, of the lawful marriage of George Cunningham and Bridget Mitchell. She had a half-brother by the name of George Cunningham, since deceased, who was the father of Mary Connolly, one of the intervenors in this suit. Her brothers and sisters of full blood were Timothy Jerome, now a resident of California; Ellen, now Widow Tully, residing in California, both intervenors, Mary and Anne, who both died in Ireland in infancy, and Laurence and William, who both came to America, and who are supposed to be dead, or whose whereabouts and fate are entirely unknown to their relatives. Widow Bridget Cunningham, eighty-four years of age, is still living and resides in California with her daughter, Widow Ellen Tully.

In July, 1849, Bridget Cunningham left home for America, in company with her brother Timothy. But at Liverpool they separated; Bridget sailing for New York, where she landed in due time, and Timothy sailing for Boston, where he remained a short time. He then came to New York, where he diligently searched for his sister Bridget, but was unable to find her.

Bridget Cunningham remained in New York for one year, spending her time with friends who had preceded her to that city from King's county, Ireland, and whom she had known in the old country. On a certain day in 1850 she left the house of one of those friends with whom she had spent the better part of her time, saying that she was going out to look for a situation, and from that day to the present time she was never seen or heard of as "Bridget Cunningham," by any of her friends in New York, her relatives in California, her friends in Ireland, or any of the witnesses who have testified in the case.

Now from the evidence introduced by intervenor's opponents, and

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principally by the defendant Sykes, consisting mainly of the testimony of witnesses who are uncontradicted, unimpeached and unimpeachable, it is shown conclusively that Kate Townsend arrived in New Orleans at the end of September, 1858, direct from Liverpool in a sailing vessel, in company with another person who was known in New Orleans under the name of "Ida Moore," a member of the society known as the *demi-monde*, who subsequently became blind, and who in consequence thereof returned to England, where she died a few years later.

On the passenger list of the vessel which carried these two interesting travelers, their names are entered as "Mary Ann Wingfield" (who became Ida Moore) and "Martha Wingfield," who became "Kate Townsend," and who thenceforth never went by any other name. Kate Townsend, immediately after her arrival in New Orleans, began the life of a prostitute, which she never abandoned, having gone through all the grades of that class, ending as the proprietress of a large and well known house of that kind. She made her home in New Orleans, which she left for two short absences during the late civil war only, and for occasional trips to New York city and other northern and western cities.

Numerous witnesses, some of whom have known Kate Townsend from 1858 to the time of her death, others for a number of years, have all testified in that sense, and according to the preponderance of their testimony she was, in 1858, of the age of eighteen to twenty years.

These are the only salient facts in the case which are established with any legal certainty.

On all other points in the controversy the testimony is distressingly conflicting; much of it is self-contradictory and self-destructive, from the examination and study of which the mind turns back disgusted, bewildered and unsettled in any conviction.

But intervenors, feeling the obligation to identify the lost "Bridget Cunningham" as the murdered "Kate Townsend," of New Orleans, and being entirely unable to introduce a single witness who could give direct testimony of the fate of Bridget Cunningham after her disappearance from the house of her friend in New York in 1850, have had recourse to secondary evidence to accomplish that purpose.

One of the means resorted to has been to show the physical resemblance between Bridget Cunningham and photographs and other likenesses taken from Kate Townsend. It must be noted at this point that no witnesses who had seen Bridget Cunningham before her disappearance in 1850 ever saw Kate Townsend after the year 1858, when she arrived in New Orleans. Hence intervenors have introduced in

evidence a daguerrotype taken some time between 1858 and 1865, two photographs taken in 1870, and another taken in 1880, all shown to have been intended as likenesses of Kate Townsend, all of which have by consent of counsel been submitted to us for inspection and comparison, together with a photograph taken of Mrs. Ellen Tully, one of the intervenors; as several of the witnesses have testified to a strong resemblance between her and the deceased.

We agree with several experts who have testified in the case that this mode of detecting resemblance between persons, especially by means of pictures or likenesses is far from being reliable to establish identity. Their opinion is illustrated by our experience in this very case. Differing from several witnesses in the cause, we entirely fail to detect any resemblance between any of the pictures taken of the deceased and the photograph taken of Mrs. Ellen Tully. And in perfect accord with several of the experts, we detect very little or no resemblance between the photographs taken of the deceased in 1870 and the one taken in 1880, and none at all between the latter and the daguerrotype taken in 1858 or 1860. And yet we find the witnesses in Ireland asserting in their testimony that they see a very striking resemblance, satisfactory to them as a complete identity between the photograph of 1880 and Bridget Cunningham as she appeared to them in 1849. She is described by them as being at that time a handsome, well-shaped, well-proportioned lass, with a fair complexion, with dark eyes and dark hair, with regular, well defined and handsome features, whereas the photograph of 1880 represents an enormous woman weighing nearly 300 pounds, almost a fleshy monstrosity, with a face and a bust almost distorted with unshapely and fat flesh, taken thirty-one years after they had lost sight of Bridget Cunningham, of whom they had no likeness taken of her at any time in her youth, as an indispensable point of comparison. Evidently the "wish must have been father to the thought" in inspiring such opinions. The same may be said of the New York witnesses who detected the same resemblance, and particularly of one of the number, who found a striking resemblance between the photograph of 1880 and those of 1870, the latter of which are admitted by all the witnesses who knew Kate Townsend as the best extant pictures of her. The artist who took that of 1880 admits himself that it bears very little likeness to the deceased; and the other experts testify that unless told so they could not even suspect that the photograph in question had been taken from Kate Townsend.

The question of resemblance, either between the deceased and

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Ellen Tully or between Bridget Cunningham and the pictures of Kate Townsend may therefore be dismissed as a very weak link in the chain of evidence necessary to establish the alleged identity of the lost sister with the unfortunate deceased. Interveners also rely on the testimony of several witnesses, principally dress-makers, hair-dressers, chambermaids, washerwomen and other servants, who state that while in the employ of Kate Townsend she had told them in secret confidence that her name was "Cunningham," and to some "Bridget Cunningham;" that she was born in Rashina, King's county, Ireland, where she had a mother, a sister named Ellen, and brothers. The most striking feature of that testimony is that while those family secrets have been confided to some of the witnesses as far back as nineteen years before the trial below, and had been repeated on subsequent occasions and at divers times, nothing was ever said or divulged to any one of the witnesses in the presence of any other person. Another extraordinary feature is that two or three illiterate women, who don't know their own ages, cannot remember the names of the streets which they lived on, who cannot remember whether they were married or single at the time when such disclosures were made, can distinctly remember *Rashina*, the name of Kate's birth-place, which they had heard but once, and that eighteen or nineteen years before they gave this testimony.

There must be a limit to judicial as well as to human credulity, especially when considering testimony concerning statements by a person since deceased. Jurisprudence has invariably ranked such evidence as of the weakest kind.

In the case of *Bringier vs. Gordon*, 14 Ann. 274, this Court, in dealing with that kind of evidence, used the following emphatic language: "The evidence offered consists of the verbal admissions or acknowledgements of the deceased to a single witness, made at a particular time and place, when the deceased and witness were alone."

"The impossibility of contradicting a witness under such circumstances, and his entire immunity from temporal punishment for false swearing, have induced the courts to receive such testimony with disfavor, and to declare it the weakest species of evidence known to the law."

Treating of the same subject, the present Court has recently said:

"Extra judicial admissions of a dead man are the weakest of all evidence. They cannot be contradicted. No fear of detection in false swearing impends over the witness. In most instances such testimony

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is scarcely worthy of consideration." *Bodenheimer vs. Executor*, 35 Ann. 1005.

It is thus apparent that by means of that testimony intervenors have not yet succeeded to fill the judicial measure of evidence to establish identity.

They next invoke the coincidence that Bridget Cunningham had the small-pox when quite young, in consequence of which she was slightly pock-marked; and that Kate Townsend was also pock-marked on the left side of the nose and cheek. But the evidence does not show the identity of the marks, as intervenors' witnesses do not describe the precise spot of Bridget's face which showed the marks. But even if the marks were identical, it would only be a strong coincidence which together with other links might contribute to complete the chain of evidence necessary to identity; but as it stands in the record, it amounts to nothing more than a coincidence.

This analysis of the evidence, and of the strongest points urged by intervenors, leads logically to the conclusion that they have not made out their case, and that they should be non-suited.

But counsel for the state very confidently argue that there is sufficient evidence in the record to justify and even to dictate an absolute judgment against intervenors; and those views prevailed with the district judge.

The contention is that on the question of identity the testimony against intervenors is strong enough to establish a negative, and to show conclusively that "Bridget Cunningham" could not be, and never was, "Kate Townsend."

In that line of argument they invoke the testimony which shows that Bridget Cunningham had dark hair and dark eyes, with a corresponding complexion, whereas Kate Townsend is positively shown to have been a blonde, with light brown hair, hazel or light brown eyes, and of fair complexion. In that connection the evidence is not conclusive either way. The difference in the shade of the color of the human eye, between a dark and a brown eye, is not so easily perceptible as to be seized with sufficient accuracy so as to rest a judicial conclusion, without actual inspection of the person who is the subject of discussion. And, hence, it occurs, as it is inevitable in such matters, that the witnesses who knew the deceased who try to describe the color and shade of her eyes, are not all of the same opinion. As to the color of her hair, the record shows that she used ingredients by which she operated a change in its color and general appearance as she advanced in age. The difference on that ground is not sufficiently marked as to

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preclude the possibility of "Bridget Cunningham" and "Kate Townsend" being one and the same person. It is also contended on the part of the State that it appears conclusively from the preponderance of the evidence that Bridget Cunningham could read and write, whereas it appears as conclusively that when Kate Townsend arrived here, and for several years thereafter, she did not know one letter of the alphabet from the other, and that all the writing which she was ever able to do, even after being patiently taught, was to make her signature, which she had been taught to write mechanically.

The evidence does show that condition of things as to Kate Townsend, but on the other hand it does not appear satisfactorily that Bridget Cunningham was much more advanced in education or learning. She did go to school for several years, but it is shown that the school was not very efficient, that the girl was wild, unruly and not at all studious, and that she could read but very little. Hence, that point is not conclusive in favor of the State.

The next contention is that Bridget Cunningham was born between 1830 and 1833, whereas Kate Townsend could not have been born before 1840, as she is shown to have been only 18 years of age on her arrival here in 1858. There is no conclusive evidence on either point of that contention, and all the testimony touching the age of Kate Townsend is mere opinion and guesswork. No two witnesses precisely agree as to her age, and according to some of the most creditable witnesses she might have been 25 years of age in 1858, which would likewise have been the age of Bridget Cunningham, for it appears from the preponderance of the evidence that she was born about the year 1833. This appears from the testimony of her mother, of her brother and of her sister. On this point of identity, the intervenors had it within their power to establish the age of Bridget Cunningham with legal certainty, and it is somewhat singular, if not suspicious, that they failed to use the easy means which were in their reach. In her testimony Mrs. Ellen Tully says positively that all the Cunningham children, including Bridget, were baptized immediately after their birth in a Catholic Church situated in the village of "*Ballinahound*," at a distance of two miles from Rashina. Now this Court takes judicial cognizance of the universal custom in all the Catholic Churches in the world, that a registry of baptisms is kept with great care, and that extracts from such registers, duly attested, are legal evidence in the courts of Louisiana. Intervenors took the testimony of several witnesses in King's county, Ireland. Why did they neglect to provide for that particular link in their chain of evidence?"

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But the apparant discrepancy in the ages of the two persons is not conclusive.

There is no more force in the contention that because Bridget Cunningham sailed from Liverpool to New York in 1849, and Kate Townsend came directly to New Orleans from Liverpool in 1858, they could not be one and the same person.

As neither party has shown what became of Bridget Cunningham after her disappearance in New York in 1850, there is no actual impossibility of her having returned to England and of her coming thence in 1858. Intervenors have failed to show that she did return to England; hence their case stands without that important link in the chain; but the State has on the other hand failed to show that she had not thus returned, hence her counsel cannot claim a judicial declaration of their negative but unsupported assertion.

It is true that Mrs. Littlefield testifies to have known the deceased in London in 1852 or 1853 under the name of "Kate Neal," but she might have changed her name then as easily as she changed it later on. The statements of the witness that "Kate Neal" had come with her mother from Waterford county, Ireland, to London, where she had lived continuously up to the time that Mrs. Littlefield met her there, were made as coming from Kate's alleged mother, and from Kate herself, hence her testimony on that point is partly hearsay, and partly the statement of a deceased person, and as such, not entitled to more favorable consideration than similar testimony emanating from intervenors' witnesses, as herein above disposed of.

The same reasoning may be applied to the testimony of numerous witnesses who state that Kate Townsend had repeatedly told them that she had never been to New York previous to the year 1870, and that she had no father, mother or relatives "on the top of the world." No more conclusive is her declaration in her will that she had "no father or mother living and no forced heirs." It is admitted on all sides that her name was not "Kate Townsend," and yet in her will she formally declared that it was. This case forms an exception from the general rule of jurisprudence which gives great weight to the declarations of facts made by a testator in his last will.

These premises, established after a long and tedious study of the case, lead to the logical conclusion of a judgment of non-suit against intervenors. And, under the effect of such a decree, it stands to reason that the State cannot recover an absolute judgment decreeing her an irregular heir of the succession, but the only decree to be rendered in her favor is to place her in possession of the property of the de-

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ceased under the provisions of Article 1204 of the Civil Code, which is hereinabove transcribed in full.

In accordance with the general rule of our law and of our jurisprudence the appellee should be condemned to pay the costs of this appeal.

But as a litigant the State is an exception to the general rule, as in no case the sovereign can be held liable for costs of litigation in his own courts. *State vs. Richard Taylor*, 33 Ann. 1272; *State vs. Miles Taylor*, 34 Ann. 978.

But as this suit is an incident of the settlement of the succession of the deceased, the apparent difficulty growing out of the State's immunity from the payment of costs is easily obviated and full justice done by taxing the costs against the succession itself.

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed, and proceeding to render such a judgment as should have been rendered below, it is ordered, adjudged and decreed that the claim herein propounded by intervenors, Widow Bridget Cunningham, Widow Ellen Tully, Timothy J. Cunningham and Mary Connolly be rejected, and that their petition of intervention be dismissed, as in case of non-suit; and it is ordered that the State of Louisiana be decreed to be entitled to the possession of all the property belonging to the succession of Kate Townsend, and it is therefore ordered that after due administration of said succession, after payment of its debts and after the payment of the costs of this appeal, which are hereby taxed against the succession aforesaid, the residue of the property of said succession be turned over and paid into the Treasury of the State of Louisiana, to remain therein deposited, and further dealt with according to law and to the views herein expressed.

SEPARATE OPINION.

FENNER, J. I differ from the majority of the court in my appreciation of the evidence in support of the claims of intervenors.

Bridget Cunningham, a beautiful young Irish girl, born in 1833, in Rashina, Kings County, Ireland, daughter of George and Bridget Cunningham, having a sister two years younger named Ellen, and several brothers, left Ireland in 1849, went to Liverpool and thence sailed to New York.

In New York she was known and entertained by various acquaintances and friends of the Cunningham family, and led there, so far as known, a virtuous life until about 1850, when she suddenly disappeared

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without any apparent cause, and under no suspicious circumstances, and has never since been heard of by her family or friends. There is no evidence that she died, and there was no known reason for her secreting herself.

When a beautiful girl thus vanishes and conceals herself, if death has not overtaken her, the unhappy inference is natural that she has fallen from virtue and adopted a life of shame.

In 1858, there arrived in this city, on an emigrant ship which sailed direct from Liverpool, a beautiful young Irish girl, a prostitute, who assumed the admittedly false name of Kate Townsend, under which she lived and pursued her disgraceful calling until her tragic death in 1883.

The New York Police Gazette, in its contemporaneous account of that thrilling tragedy, published pictures of Kate Townsend, and contained the statement that she was of Irish birth, and that her true name was Bridget Cunningham.

A copy of this paper reached the relatives of Bridget, and formed the first clue they had ever discovered to the possible fate of the lost daughter and sister.

The statements as to her name and origin above mentioned, together with resemblance discovered, or fancied in the pictures, led to further inquiries, and finally culminated in the institution of the present intervention, in which they claim the identity of Kate Townsend with Bridget Cunningham, and that they are her lawful heirs.

I fully agree with the majority opinion in the legal proposition that intervenors carry the burden of proof, to establish, with reasonable certainty, the identity asserted, and their consequent heirship.

Have they discharged this burden?

I find the following facts and circumstances in their favor, which have great weight on my judgment:

1. If Bridget Cunningham did not die, of which there is not the slightest evidence, actual or presumptive, her sudden disappearance and persistent concealment make it probable, as I have said, that she resorted to a life of shame, and her subsequent discovery in the character of a prostitute would be entirely reasonable and natural?

2. Bridget's going to Liverpool, when she vanished from New York, is equally natural, because that was the only route from New York with which she was acquainted, being the one by which she had come. An additional circumstance strengthening this probability is the fact that she bore on her arm the name "A. Pimm," tattooed after the fashion peculiar to sailors, indicating that her seducer was of that call-

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ing, and thus making likely her departure from New York by sea and her appearance in the great port of Liverpool, which bears to sailors the same relation which Rome bore to Italians in being a place to which "all roads lead." The coming of Kate Townsend from Liverpool to this city is thus, in no way, out of harmony with the identity claimed.

3. If Bridget lived she would have been twenty-five years of age in 1858. The testimony as to Kate's age when she arrived here in that year is conflicting, and is based on opinions of those who knew her and on her own statements. Some estimate her age as high as twenty-five, others as low as eighteen. Considering the deceptiveness of appearances as between such periods of life, and the tendency of woman of her class to understate their age, I think the conclusion justifiable that there was no disparity of age hostile to identity.

4. As to color of hair and eyes, stature and general physical type, and as to education, there are some apparent conflicts in the evidence, of little value, and easily reconcilable, but, taken as a whole, it establishes, in my judgment, a substantial correspondence.

5. No photograph or other image of Bridget Cunningham, taken before her disappearance, exists; but every witness produced who ever saw her (and they are numerous), testifies emphatically to the recognition of her likeness in the photographs of Kate Townsend. The honesty and respectability of these witnesses are unimpeached; some of them are entirely disinterested; and, while time undoubtedly makes great changes in human appearance, these changes are much less in some persons than in others, and human experience does not forbid the belief that the original stamp imprinted by Mother Nature may remain legible amid all the changes wrought by middle age and obesity. We have had before us photographs of Kate, one taken before 1860, representing a slender youthful woman, and others taken long afterwards, when she had become abnormally fleshy, and the identity is perfectly apparent—the resemblance being very much greater than between two of her photographs taken by different artists at about the same time.

6. Numerous witnesses who knew Kate Townsend, on seeing her alleged sister, Mrs. Ellen Tully, have testified to the strong resemblance between the two, not only in facial appearance, but in their movements, gestures, bearing and general physical traits. Amongst these witnesses are the eminent photographers, Messrs. Washburn and Lilienthal, whose profession entitles them to be considered as physiological experts.

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7. It is established by undisputed evidence that both Bridget Cunningham and Kate Townsend had slight pock-marks, and Kate told McLearn that she had small-pox when quite young, which also corresponds with the facts as to Bridget. Such a coincidence might be the result of accident; but, as a clearly proved independent fact, it lends enormous weight to the other circumstances indicating identity.

8. There unquestionably did exist, at the time and before Kate's death, a well-authenticated rumor and impression that her true name was Bridget Cunningham.

This is established by the publication in the Police Gazette, before referred to, and is confirmed by the testimony of Mr. Aubertin, a witness of admitted respectability, and whose credibility is not assailed, that he had heard this rumor in New Orleans several years before Kate's death. Here we have another mysterious fact in the case which the State neither contests nor explains or accounts for in any manner.

9. The intervenors have introduced several witnesses who have testified that, at various times, in moments of confidence, Kate Townsend had told them the facts of her early history; that her name was Bridget Cunningham; that she was born in King's County, Ireland; the names of her mother, sister and brothers and other particulars fully identifying her with the missing Bridget. If these witnesses are to be believed no one would dispute that the case of intervenors is clearly established. Their testimony is fiercely assailed by counsel for the State. They were subjected to the utmost rigor of cross-examination. Some of them were ignorant washerwomen, dressmakers and hairdressers, who, under the fire of cross questions, fell into various inconsistencies not unusual with that class of witnesses. Others had characters not free from stain. I do not propose to discuss the details of this testimony, but content myself with the sentiment that so far as the substantial facts are concerned it is reasonable, probable and consistent, and I find no sufficient reason for disbelieving it. Indeed to regard this evidence as merely manufactured, without foundation in truth, would attribute to these witnesses a fertility of imagination and of ingenuity in circumstantial lying, which is absolutely incredible.

10. A significant fact which overshadows all the theories of the case is this: Unless Kate and Bridget were the same person, the known life of each is a fragment. Not a witness is found who ever saw or knew of the existence of Bridget, after her disappearance from New York about 1850. Not a witness is found who ever saw, or knew of the existence

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of Kate prior to that date. There is no reason to doubt that Bridget continued to live after her disappearance. It is certain that Kate did live prior to that event. It is not singular that knowledge of the existence of the one should cease before knowledge of the existence of the other began? The identity of the two blends these mysterious fragments into one consistent human life, and explains and reconciles every difficulty in this strange case. I shall not pursue the subject further. Each one of the foregoing circumstances is, by itself, a strand easily broken; but, combined, they seem to me to form a cord of strength amply sufficient to sustain the burden of proof required of intervenors.

I have given careful and candid consideration to all the objections urged by the State against the testimony in support of intervenors' claim, as well as the testimony adduced by the State herself. The latter is fairly considered in the majority opinion. I might consume many pages in discussing the objections, and showing why they are of no avail, in my opinion. But this would be useless. If the matter depended on my judgment alone I should favor a decree for intervenors. But I bear cheerful testimony to the faithful and herculean labor which has been expended in the study and analysis of this enormous record; and remindful of the imperative requirement imposed by the law on intervenors to establish their case with a certainty satisfactory to the judicial mind, I hesitate in holding that such requirement is discharged when they succeeded in satisfying the mind of only one out of the six judges who have considered the case. The decree being of non-suit only I shall not dissent.

No. 10,008.

HENRY E. WILLIAMS VS. PULLMAN PALACE CAR COMPANY ET AL

The obligation of a sleeping car company for injury to a stranger who enters the car for the purpose of asking the privilege of washing his hands and is there, wantonly and without provocation, assaulted and beaten by the porter of the car, is not governed by the principles regulating the liability of common carriers, under the contract of carriage, for like assaults committed by their servants on their passengers. The two cases discriminated and authorities reviewed.

The obligation of the company in such a case being independent of any contractual relation, is governed by the general principle of the law of master and servant common to all systems of law and formulated in Louisiana Civil Code as extending to all "damage occasioned by their servants in the exercise of the functions in which they are employed."

The earlier doctrine that "in general a master is liable for the fault or negligence of the servant, but not for his wilful wrong or trespass," has been greatly modified in modern

40	87
46	749

40	87
4104	482
40	87
105	127

40	87
116	322
116	554

40	87
119	500

40	87
1125	109

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jurisprudence, which places the test of the master's liability, not in the motive of the servant or in the character of the wrong, but in the inquiry whether the act done was something which his employment contemplated and which, if properly and lawfully done, would have been within the scope of his functions.

The facts that the party injured was not a trespasser, but was lawfully on defendant's premises and was properly dealing with defendant's servant as a servant, do not suffice to fix defendant's liability, if the assault was wanton and entirely foreign to the functions committed to the servant; otherwise a bank, or a merchant, or a householder, would be liable for wanton assaults committed by their clerks or servants upon customers or visitors, which liability would clearly not exist unless the masters were guilty of fault in employing so dangerous a servant.

The evidence establishes that the porter offending in this case had been in defendant's employment for three years, and had always conducted himself properly and bore a good character for amiability, sobriety and politeness; that porters are mere menial servants, having no police authority whatever, and no connection with the enforcement of the rules of the service except to report violations of them to the conductor, and that he had no authority to use violence towards any person for any purpose whatever. Hence this wanton assault was entirely foreign to the functions of his employment, and defendant cannot be held responsible therefor.

Ratification of an unauthorized and unlawful act can only be inferred from acts which evince clearly and unequivocally the intention to ratify and not from acts which may be readily and satisfactorily explained without involving such intention. In this case, there being no witnesses, and plaintiff and the porter giving very different accounts of the affair, ratification of the misconduct imputed by plaintiff cannot be inferred from the retention of the porter, when the defendant so acted because it honestly believed the latter and thought it just to maintain the *status quo* at least until judicial determination of the conflict. Nor is the case affected by the fact that the porter was criminally convicted of assault and battery, when in such a trial the porter was not heard as a witness in his own defense, and when he might have been so convicted on evidence falling far short of the outrage charged by plaintiff.

A PPEAL from the Civil District Court for the Parish of Orleans.
Tissot, J.

W. S. Benedict and Read & Goodale for Plaintiff and Appellee.

Alfred Ennis and Percy Roberts for Defendant and Appellant.

The opinion of the Court was delivered by

FENNER, J. This is an action for damages, for an injury inflicted by a servant of the defendant employed as porter on one of its cars.

Plaintiff alleges that he had purchased a ticket and was a passenger on a train of the Louisville, New Orleans and Texas Railway Company between Zacharie Station and Baton Rouge, in this State; that, having soiled his hands, he went to the wash basin in the ordinary coach of the train to cleanse them, but found there was no water, and on application to a porter or brakeman of the car, he was told, "just step back in the sleeper and you will find water, towels, comb and brush;" that thereupon he went back to the sleeper, the door of which

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was opened by the porter of the sleeping car, stepped just within the door, and asked said porter if he could wash his hands, when the latter replied in a rude and insulting manner: "Well, sir, if you do, you will pay for it;" that plaintiff jestingly and good-humoredly replied: "You would not think of charging a man anything to wash, when we have so much water in this country?" *whereupon, before plaintiff made any further advance in the car, the said porter, John Wiley, suddenly, with a jerk, pulled down plaintiff's hat over his eyes and with some blunt instrument struck petitioner a violent blow on the head, cutting through the hat into the scalp, making a ghastly wound and knocking your petitioner senseless out on the platform of the car, where he lay at the imminent peril of his life (the train going at full speed) until rescued by persons who saw him from the adjoining car, the said Wiley having, as soon as he had thus disposed of petitioner, slammed and fastened the door of the coach, leaving him to his fate.*

Such are the allegations of the petition, confirmed, almost *totidem verbis*, by the testimony of plaintiff, who is shown by the record to be a gentleman of social position and excellent character.

The porter, of course, tells a very different story, which, if true, would place plaintiff in such precedent fault as would clearly bar his action for damages, even if it did not fully justify the assault and battery in the eyes of the criminal law.

But the jury evidently believed the plaintiff; and, without needless comment, the evidence in the record furnishes no ground for reversing their conclusion, notwithstanding the almost incredible character of the statement.

The case presents for our determination two questions, viz:

1. Is the defendant responsible for such acts of its servants as those complained of?
2. If not originally reliable, has it become so, in this case, by ratification of its servant's conduct?

I.

Plaintiff was not a passenger on defendant's car, and there was no contractual relation of any kind between them.

The case, therefore, does not fall within that numerous class of authorities which enforce the obligations of the common carrier, under its contract of carriage, towards its passengers.

Counsel for plaintiff has rested the law of his case almost wholly upon a recent learned decision of the Supreme Court of Maine, where a Railroad Company was held responsible for insult, abuse and assault by its brakeman upon a passenger, almost as wanton and unprovoked

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as that charged in the instant case. But a reference to the case shows that the responsibility was imposed solely on the ground of the contract of carriage. Thus, after stating the evidence, the Court said: "Upon this evidence the defendants contend that they are not liable, "because, as they say, the brakeman's assault upon the plaintiff was "wilful and malicious and was not, directly or indirectly, authorized "by them. They say the substance of the whole case is this, that 'the "master is not responsible as a trespasser, unless, by direct or implied "authority to the servant, he consents to the unlawful act.' The fallacy of this argument, when applied to the common carrier of passengers, consists in not discriminating between the obligation which "he is under to his passenger and the duty which he owes to a "stranger. It may be true that if the carrier's servant wilfully and "maliciously assaults a stranger, the master will not be liable; but "the law is otherwise when he assaults one of his master's passengers. "The carrier's obligation is to carry his passenger safely and properly, "and to treat him respectfully, and if he intrusts the performance of "this duty to his servants, the law holds him responsible for the manner "in which they execute the trust. He must not only protect his passengers against the violence and insults of strangers and co-passengers, but *a fortiori* against the violence and insults of his own servants. * * * This liability of the master is very clearly "expressed in a recent case in Massachusetts. The court say that "wherever there is a contract between the master and another person, "the master is responsible for the acts of his servant in executing that "contract, although the act is fraudulent and done without his consent. *Howe vs. Newmarch*, 12 Allen 55. And Messrs. Angell & Ames, in their *Work on Corporations*, §388, say: 'A distinction "exists as to the liability of a corporation for the wilful tort of its "servant toward one to whom the corporation owes no duty except "such as each citizen owes to every other; and that towards one who "has entered into some peculiar contract with the corporation by "which such duty is increased; thus it has been held that a railroad "corporation is liable for the wilful tort of its servants whereby a "passenger on the train is injured.'" *Goddard vs. R. R. Co.*, 57 Maine 202.

The Court in its opinion refers to many authorities, all tending in the same direction, but further quotation is needless. Perhaps the principle was never more clearly expressed or placed on a sounder basis of reason than by our own court which has thus formulated it: "When the proprietors of vessels use them for the purpose of carry-

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ing passengers for money, they subject themselves to the same responsibility for a breach of duty in their officers to those passengers, as they would for their misconduct in regard to merchandise committed to their care. No satisfactory distinction can be drawn between the two cases." *Keene vs. Lizardi*, 5 La. 431.

The absence of any contractual relation between plaintiff and defendant removes this case from the application of the line of authorities above indicated. The responsibility of defendant, if it exists, must be found in the general principles of the law of master and servant as applicable to all masters similarly situated.

The Civil Code of this State enunciates the rule of *respondent superior* in terms which exactly correspond to the rule of the common as well as the civil law: "Masters and employers are answerable for the damage occasioned by their servants and overseers, in the exercise of the functions in which they are employed."

As is well said by Judge Cooley: "It will readily occur to every mind that the master cannot, in reason, be held responsible generally for whatever wrongful conduct a servant may be guilty of. A liability so extensive would make him guarantor of the servant's good conduct, and would put him under a responsibility which prudent men would hesitate to assume."

The earlier doctrine of the common law affirmed the rule that "in general a master is liable for the fault or negligence of the servant, but not for his willful wrong or trespass." 2 Hilliard on torts, p. 524; *McManus vs. Crickett*, 1 East. 106; *Sharrod vs. Railway*, 4 Exch. 580; *Roe vs. Birkenhead*, 7 Exch. 36; *Wright vs. Wilcox*, 19 Wend. 345.

But the tendency of later jurisprudence is to discard this distinction and to recognize the liability of the master not only for the negligence of his servants, but also for their torts, when done within the scope of their employment, or in the language of the Code, "in the exercise of the functions in which they are employed." It matters not that the acts are willful and tortious, nor that they have been committed in disobedience of the express orders of the master; if they have been done in the exercise of the functions of the employment, the master is responsible. "The test of the master's responsibility," says Judge Cooley, "is not the motive of the servant, but whether that which he did was something which his employment contemplated, and something which, if he should do it lawfully, he might do in the employer's name." Cooley on Torts, p. 536.

The great difficulty in applying these principles lies in defining what acts properly fall within the scope of the servant's employment.

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The evidence in this case establishes that the porters employed in defendant's service are mere menials employed to clean up the car and keep it in order, and to wait upon the passengers, having no police authority whatever, and no connection with the enforcement of the rules of the service except to report violations of them to the conductor. Anything more completely outside of "the functions in which he was employed," than the assault committed on the plaintiff could hardly be conceived. If it had been his duty forcibly to prevent the plaintiff from entering the car, or to put him out at all, and in performing this duty he had used wanton and needless violence, inflicting injury, defendant might have been responsible. But he had no such duty or authority. We do not lose sight of the fact that plaintiff was not a trespasser, but had a right to enter the car for the purpose of asking permission to wash his hands, or of trying to hire the privilege, and that in addressing the porter he was dealing with him as a servant of the company. This emphasizes the outrage to which he was subjected, but would be a dangerous ground for holding the employer responsible. A person has a right to enter a bank for the purpose of collecting a check, and to present it to the paying teller for payment; but, if, on such presentation, the teller should leap over the counter and knock him down, surely such an act would not subject the bank to liability. So one may lawfully enter a store and deal with any clerk with reference to the purchase of goods, but, if, on some dispute, the clerk should commit assault and battery upon him, the merchant would not be responsible therefor. Or if one, on lawful business, should knock at the door of any private house, and on asking the servant who answered the call for permission to see the master, the servant should assault and beat him, would the master be responsible?

Clearly, in all such cases, the lawfulness of the party's conduct and the fact that the injury was received while he was properly dealing with the servant as a servant, would not suffice to bind the master, unless the latter had expressly or impliedly authorized the act, or had been guilty of some fault in knowingly employing so dangerous a servant.

We cannot distinguish this case from the one above indicated.

The evidence exonerates the defendant from any fault in the employment of Wiley as a porter. He had been in their employment for three years, and during all that time had borne a good character for sobriety, amiability and politeness.

A case quite similar to this is found in our own reports, where the

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lock-keeper of a canal whose duties were to keep the locks, to open and close them, and to collect the tolls, assaulted and cruelly beat an oyster-trader under the pretext that he had not paid his toll, and the Canal Company was sued for these tortious acts, but this Court rejected the demand, saying: "When an agent, losing sight of the object for which he is employed, commits wrong and causes damage, the principal is no more answerable for them than any stranger; as to such wrongs, the agent must be considered as acting of his own will, and not in the course of his employment, or under any implied authority of his principal." *Ware vs Barataria*, 15 La. 169.

In another case it was said: "The rule seems to be that when the agent, acting in the capacity bestowed upon him by the corporation and in the discharge of some duty or employment directed by the employer or incidental to his situation, does an act that causes damage, the corporation is responsible; but when the agent does any act of his own free will, without reference to his functions as a corporate agent, the corporation is not responsible. For example, if a person should go into a banking house or an insurance office and there get into a difficulty or dispute in relation to business of the corporation with an agent or officer, and an assault and battery should ensue, we suppose it would not be seriously contended that the bank was answerable in damages, unless there was some express recognition of the act." *Etting vs. Commercial Bank*, 7 Rob. 459; *Dyer vs. Riely*, 28 Ann. 6; *Pierce on Railroads*, p. 279; *Field on Corporations*, §524, 623; *Isaacs vs. Third Av. R. R. Co.*, 47 N. Y. 122; *R. R. Co. vs. Baum*, 25 Ind. 72; *R. R. Co. vs. Harrison*, 48 Miss. 112; *Flower vs. R. R. Co.*, 69 Penn. St. 210.

Under these views, while we share plaintiff's indignation at the outrage committed on him, we cannot fix the duty of reparation on the innocent defendant, upon whom it is not imposed by the letter or spirit of the law.

II.

It is claimed, however, that if not originally responsible, the defendant has ratified the act of the porter by retaining him in its employ after knowledge of his conduct.

It is incredible that the company should have intended to approve or ratify such conduct as that attributed to the porter.

Ratification can only be inferred from acts which evince clearly and unequivocally the intention to ratify, and not from acts which may be readily and satisfactorily explained without involving any such intention. *Breaux vs. Saddle*, 39 Ann., and authorities there cited.

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Now, in this case, there were no witnesses to the incident except the parties thereto. They gave very different accounts of it. The defendant, prompted by its previous knowledge of the porter, believed his story and did not believe that of plaintiff. It illustrated the sincerity of its conviction by the very fact of retaining the porter, for if, after this incident, the porter had again committed a similar outrage, defendant would undoubtedly have subjected itself to a much more dangerous claim for damages.

If it honestly believed that the porter was innocent of the outrageous conduct charged against him, his retention was, under such belief, an act of courageous justice, and certainly presents no element of ratification.

Nor is the case affected by the fact that the porter was criminally prosecuted and convicted for assault and battery. His own testimony was not, under the law then in force, admissible in that prosecution. And, moreover, he might have been convicted on evidence falling far short of the outrage charged by plaintiff. The porter had been discharged for other causes, before the trial of this suit, and we think the defendant company cannot be charged with ratification of such an outrage, because, in the conflict between the statements of the parties, it believed its own servant, and, at all events, thought it just to preserve the *status quo* until the judicial determination of the dispute.

It is, therefore, ordered, adjudged and decreed that the verdict of the jury and the judgment appealed from be annulled, avoided and reversed, and there be now judgment in favor of defendant and rejecting the demand of plaintiff at his cost in both courts.

 No. 10057.

W. M. MAYEWSKI VS. HIS CREDITORS.

An opposition to an insolvent's cession and discharge, grounded on a charge of fraud, is in the nature of an answer, and citation to the insolvent is unnecessary.

On the trial of such opposition, the insolvent is a competent witness in his own behalf.

If an insolvent debtor is shown to have committed any "kind of fraud, to the prejudice of his creditors," whether it is specifically denounced in the statute or not, he may be proceeded against, and condemned, under R. S. §1803.

Sections of Revised Statutes, 1803 and 1804, relate to different classes of fraud: one provides for fraud *per se*, and the other for *presumptive* frauds.

While the insolvent law is a highly penal statute, it is not a criminal law, and the charge made against the plaintiff is not a criminal but a civil one. Hence, the court *a qua*, had jurisdiction.

Section 1805 of the Revised Statutes is a valid and constitutional law.

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47	1404
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The penalty that is denounced by this statute is not imprisonment for debt; and the statute does not conflict with the act of 1840, which abolished the writ of *ca. sa.*

One State or Government, cannot in virtue of its criminal laws, punish acts committed against the laws of another State; but in a civil proceeding, like the instant one, proof of fraud or theft committed in another State by an insolvent debtor, will sustain a charge of fraud that is made against him in the courts of this State.

Additional and extraneous evidence, not offered on the original trial of the suit, cannot be introduced on the trial of an application for a rehearing, unless it is based wholly or in part, on the ground of it being newly discovered testimony.

To support a charge of fraud under the insolvent law, it is unnecessary that the proof should show that the mass of creditors have been injured by the fraudulent acts of the insolvent debtor, whereby the amount of property applicable to their demands has been reduced. It will suffice, if the proof shows that the insolvent obtained goods under a false and fraudulent pretence from a single individual creditor.

A PPEAL from the Civil District Court, for the Parish of Orleans,
Monroe, J.

A. J. Lewis and Farrar & Kruttschnitt for Plaintiff and Appellant:
I.

ON OBJECTION TO JURISDICTION OF THIS COURT.

1. Where an insolvent files a schedule showing debts amounting to over \$13,000; and where a creditor, before a creditors' meeting has been held, files an opposition on the grounds of fraud, and praying for a judgment depriving the insolvent of the benefit of the insolvent laws of the State, and sentencing the insolvent to imprisonment: the matter in dispute is the amount of debts on the schedule from which the insolvent seeks a release, and not the amount of the claim of the opposing creditor.
2. The mere fact, that a *proces verbal* of a creditors' meeting, not offered in evidence by either party on the trial of the opposition, is found in the Record, cannot affect either the jurisdiction or the judgment of this court.
3. Whether or not the insolvent was discharged of his debts by that creditors' meeting, is a question open to discussion, but which is not now before your Honors. Most of the votes adverse to discharge are null under the decision in *Phillips vs. Her Creditors*, 36 Ann. 904, because not properly sworn to. Suffice it for the present to state, that we do not concede that the creditors' meeting has refused the discharge.

ON THE MERITS.

I.

Delivery to a carrier is, in the absence of contrary evidence, a delivery to the consignee; and goods delivered to a carrier in New York for shipment to a New Orleans merchant, upon representations of solvency made by the latter in New York, are, if such representations be false, obtained under false pretences in New York; and such obtaining under false pretences cannot be made the subject of any penalty, civil or criminal, under the laws of the State of Louisiana. *Benjamin on Sales*, §804; *Angell on Carriers*, (5th Ed.) §497; *M. I. & P. Ry. Co. vs. Whitesel*, 11 Ind. 53; *Smith's Mercantile Law* (5th Ed.), 590.

II.

The insolvent laws of this State are of a highly penal character, and in construing them we should bear this fact in mind, and apply the canons of construction usually applied to penal and criminal statutes. *Simms vs. Bean*, 10 Ann. 346.

III.

The acts of fraud, punishable by imprisonment under the insolvent laws of the State of Louisiana, are such acts only as, directly or indirectly, tend to subtract assets from the

Mayewski vs. His Creditors.

mass, and thus to evade the equal distribution of the property of an insolvent contemplated by said laws. A fraud whose purpose or tendency is to add to the mass is not a fraud upon said laws, and not punishable under them. R. S. 1802 to 1805.

IV.

- (a) A State cannot, by virtue of its own penal laws, punish acts committed against the laws of another State; a fraud committed in the State of New York, on a citizen of New York, is not punishable by imprisonment under the insolvent laws of Louisiana, Rorer on Inter-State Law, pp. 149 *et seq.*: Graham vs. Monsergh, 22 Vt. 343; Indiana vs. Helmer, 21 Iowa, 370, 372; Richardson vs. Burlington, 33 N. J. 192; Slack vs. Gibbs, 14 Vt. 357.
- (b) *Montesquieu vs. Heil*, 4 La. 52, and *Andrews vs. His Creditors*, 11 La. 464, distinguished and explained.

Harry H. Hall, for Defendants and Appellees :

I.

R. S. 1802-3 and 4 authorize the arrest and imprisonment for fraud of an insolvent, even though the fraudulent representations were made in New York. 4 La. 57; Acts of 1840, p. 133; Acts of 1855, p. 435; Rorer Interstate Law, 149, 153; 29 Hun. (N. Y.) 288.

II.

Such proceedings are civil and not criminal in their nature. 4 La. 57, 11 La. 464; 15 La. 337; 1 Ann. 346.

III.

The intention to defraud may be presumed. Wait, Action and Defenses. III. p. 445; 29 Hun. (N. Y.) 426; 15 Sup. Ct. N. Y. 426; R. S. 1804.

The opinion of the Court was delivered by

WATKINS, J. The plaintiff resides in New Orleans, and is an importer and jobber in fancy goods.

On the 11th of November, 1886, he sought the benefit of the insolvent law of the State, on the ground that he was unable to meet his business engagements, on account of his inability to realize on his assets, or collect debts that were due him. His schedules show total assets of \$9481 31, and liabilities of \$13,479 90.

On the 22d of December, 1886, Emile S. Levi & Co., of the city and State of New York, filed an opposition to the plaintiff's discharge, in which they make a charge of fraud against him, based upon the following state of facts, viz:

That on the 20th of August, 1886, he visited their store with the view of purchasing goods; and upon the faith of his statement that he was worth \$8000 over and above his debts and liabilities, they sold him a bill of \$557 81, on a credit of thirty days from the 30th of September, provided the said insolvent, upon his return to New Orleans, would send them a written statement of his assets and liabilities, like the one he had made them verbally. This he consented to do. On the faith of his representation and promise they subsequently shipped him the goods. He failed to make them a statement, and they wrote him on

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the subject. On the 12th of September he wrote them a letter, inclosing a statement, showing his assets to be \$9729 06 and his liabilities \$453 40.

On the 4th of November he gave notice to his creditors—opponents among the number—that he was utterly insolvent and could not pay more than twenty cents on the dollar of his indebtedness; and he also submitted to them a statement of his business, as follows, viz:

Assets, \$6800 00; liabilities, \$13,353 50.

Opponents aver that said indebtedness existed wholly, or in greater part, when the foregoing statement was made to them, and said goods were furnished by them; and that said statement was false, and fraudulent, and was so made by said insolvent wilfully and knowingly, for the purpose of fraudulently obtaining said goods from them, and for the sole purpose of deliberately swindling them of the value of their property.

They aver that these acts of the insolvent constitute a fraud on them within the statute, and that no part of their claim has been paid. They pray for his arrest and confinement until he shall give bond for his appearance and answer; and that he shall be adjudged guilty of fraud, deprived of the benefit of the insolvent law, and that he be sentenced to imprisonment for a term of three years.

To this opposition the insolvent excepted that the charges were too vague and general to justify the decree prayed for, and disclose no cause of action. This exception was overruled, and he filed an answer which embraced the following points, viz:

1st. A general and special denial of the charge of fraud.

2d. That the charge made is essentially a criminal one, and that the court *a qua* was without jurisdiction to entertain it.

3d. If it is construed to be a civil proceeding then Section 1805 of the Revised Statutes, authorizing it, is unconstitutional and void, being in violation of Articles 2, 5, 6, 7 and 8 of the State Constitution, and the 4th, 5th and 6th Amendments of the Federal Constitution, because, if this proceeding be entertained, he would still be exposed to another prosecution before the courts having criminal jurisdiction, and be thereby placed twice in jeopardy for the same alleged offense.

4th. If this be a civil proceeding he is entitled to citation and service of petition.

5th. A claim of \$10,000 damages for a malicious prosecution.

On these issues the case was tried by a jury, and they found the plaintiff guilty of fraud. Thereupon the court pronounced judgment

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against him, decreeing that he be forever deprived of the benefit of the insolvent law of the State, and that he be imprisoned for one year in the Parish Prison.

From this judgment the insolvent has appealed.

I.

In this Court it is suggested in argument and brief of opponents that the insolvent has no appealable interest, and that his appeal should be dismissed *proprio motu* for want of jurisdiction *ratione materiae*. We are of the opinion that he has sufficient interest in the question of his deprivation *vel non* of the benefit of the State insolvent law to warrant his appeal. But the estate of an insolvent is like that of a deceased person; and the amount to be distributed is over \$9000.

II.

This is not a suit in the ordinary acceptation of that term. The cession of an insolvent is made in conformity to special provisions of the law, to which an opposition is in the nature of an answer. No citation is necessary, because the insolvent is in court on his own petition.

III.

The evidence introduced by the opponents fully establishes all the averments contained in their petition. There was none introduced by the defendant. For reasons best known to himself, he thought it expedient to remain silent, notwithstanding he had the opportunity to explain his course of dealing with opponents and the disparity between his statement of the 12th of September and that of the 4th of November, 1886, whereby it appears that his assets had been diminished by the sum of \$2929, and his liabilities increased by the sum of \$11,353.

The argument is made that it is *questionable* whether the insolvent had the right to testify, because the Statute authorized the opponents to require, under certain averments, the *written* answers of the insolvent. But this Statute does not preclude him from testifying, and we think he had that right, and could have exercised it if he had been desirous of so doing.

In his schedule of assets he placed his "stock and fixtures" at \$5000, and his "book accounts" at \$3354 92—the two aggregating \$8,354 92.

If, as stated in the sworn petition which accompanies his schedules, his state of insolvency was brought about through his inability to collect debts that were due him, and to realize on his stock of goods, how can he account for the deficit of \$4,998 58? For, if his "book accounts,"

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and "stock and fixtures" were converted into cash, there would still be a shortage to that extent unaccounted for.

It is evident that opponents furnished the insolvent with \$557 81 worth of goods, in the latter part of the month of August, upon the faith of his representations that he was worth \$9,729 06 over and above his liabilities, whereas his real situation was such that, two months afterwards, his values—if counted as cash—amounted to \$4998 58 less.

In other words, his representations to opponents were false, or he had sustained losses, in the interim, to the extent of \$14,727 64.

But neither the petition nor schedules pretend to account for such losses. Had he been possessed of the assets he claimed to have in September, there had been withdrawn at least \$4,998.58 prior to the 4th of November, of which he has rendered no account, and offered no explanation whatever. It is provided by R. S., section 1803, that "*every insolvent debtor shall also be considered as guilty of fraud who shall have passed simulated deeds for the purpose of conveying the whole or part of his property, and depriving his creditors thereof; or who shall have knowingly omitted to declare any of his property, rights or claims in his schedule; or purloined his books or any of them; altered, changed or made them anew, always with an intent to defraud his creditors; or committed any other kind of fraud to the prejudice of his creditors.*"

The plain significance of this statute is, that if an insolvent debtor has been proved to have passed simulated deeds for the purpose of depriving his creditors of his property; or to have, knowingly, omitted any of his property from his schedule; or to have "committed any other kind of fraud, to the prejudice of his creditors," he "*shall be considered guilty of fraud.*" Proof having been made of any fraud on the part of an insolvent debtor, to the prejudice of his creditors, he shall be considered *ipso facto* a fraudulent debtor, and treated as such. In addition, section 1804 of the Revised Statutes provides that if a debtor who has voluntarily surrendered his property to his creditors shall have done either of certain acts therein enumerated, or "*any such act,*" it shall be held "presumptive evidence of fraud;" but this presumption may be rebutted.

These two sections provide for different classes of frauds—one for a class of frauds *per se*, and the other for a class of *presumptive* frauds.

Does the proof bring the plaintiff within the compass of either? Has he committed any kind of fraud to the prejudice of opponents? If one who has passed a simulated title to his property for the purpose of depriving his creditors of it "shall be considered guilty of

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fraud;" and one who shall have knowingly omitted to declare any of his property in his schedule "shall be considered guilty of fraud," why should not the person be so considered who has not only failed to disclose his insolvency, but asserted his solvency to another in order to enable him to buy his goods upon terms of credit? Does not the one act, as well as the other, injure the creditor? Is not the fraudulent purpose and intent just as clearly discernible in one case as in the other? If one is more flagrant than the other, it is the last, because it is through the fraudulent concealment of his insolvency and the false assertion of his solvency that the credit was given and the injury inflicted. That this was the course of plaintiff's conduct is undenied and undeniable.

But counsel for the insolvent strenuously insist that it is not sufficient to prove acts of fraud upon a single individual creditor—i. e., acts by which an *individual* creditor is injured—but that the proof must show that the *mass* of creditors have been injured by the reduction through fraudulent devices of the insolvent debtor of the amount of property applicable to their demands.

His reliance is on the provisions of sections 1802, 1804 and 1808 of the Revised Statutes.

This question was directly presented and decided in *Montesquieu vs. Heil*, 4 La. 52, and from which we make the following extracts, viz:

"To sustain their opposition to the surrender of property and discharge of the insolvent from custody, his opponents rely on the *fraudulent and thieving manner in which he contracted the debt towards them*; and to support the charges of fraud and theft, they introduced in evidence the record of a suit tried in the district court, wherein it appears that they, as plaintiffs, recovered from the present appellant \$30,000 as damages, on account of a theft, by him committed, in Paris, in *stealing from their ancestor jewelry to that amount.*"

* * * * *

Again, "the evident intention of the Legislature, as ascertained by the preamble to act of 1808, is to exclude from its benefits all fraudulent debtors. The 17th section specifies *particular* acts of a debtor, which shall deprive him of the privileges and benefits accorded by the law. Does this specification of frauds preclude allegation and proof of *others*, which would demonstrate the debtor to have been *dishonest in the transactions by which he became indebted to any one of his creditors*, and fix on the former the character of a fraudulent debtor, and, ac-

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cording to the preamble, one who has deprived an honest *individual* of the community of his property? We think not. * * *

"The act now under consideration received a construction by the Supreme Court of the territory of Orleans in 1810, contrary to the claims of the appellant." 1 Martin, O. S. 159. Brown's case.

In the case cited, the insolvent was convicted of fraud and the judgment was affirmed in this court.

A careful examination of Acts 16 and 17 of 1808—and particularly of sections 17 and 19 of the former, and 5 of the latter—will disclose that the causes enumerated therein for the insolvent debtor's deprivation of the benefit of the law are nearly identical with those of R. S. 1802 *et seq.* But those contained in R. S. 1809 add to the list, "also all those whose losses shall have been occasioned by gambling, dissipation and debauch." The decision quoted from seems to meet the objection urged by plaintiff's counsel, under the law as at present in force.

If we were to express an opinion on it, as a new question, we would feel inclined to differ from the views therein expressed; but when we take into consideration the great length of time that that opinion has been suffered to remain undisturbed, we may safely rest our approval of it on the consecrated doctrine of *stare decisis*.

IV.

Counsel further insist that, while the insolvent law is not a penal statute, yet the charge made against him is a criminal one and, therefore, several consequences result that are distinctive of this proceeding.

Let us first ascertain whether the one preferred is a criminal charge. It is, that Mayewski obtained from opponents goods, on the faith of his false statement that he was solvent.

Now, while at common law, and in some of the States, it is regarded as a false pretense for a person to make a misrepresentation of an *existing condition*, or with regard to the ownership of *specified assets*, on the faith of which credit is given; yet, it is an open question, in England, whether or not it is a false pretense to obtain goods on the representation that a person is a man of means, when, in truth, he is not. 2 Whar. Crim. Law, secs. 1135 to 1138.

Hence, rather a nice question is presented, whether the insolvent's act is cognizable by a criminal court or not. But its decision is not necessary to the determination of this case. We have only to deal with the question in hand. It is quite certain that, while the insolvent law is a highly penal statute, it is not a criminal law; and no charge

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under it could be a criminal charge. It is not a good argument to insist that, because the plaintiff *might* be proceeded against under section 813 of the Revised Statutes, for obtaining goods under false pretenses from the opponents, therefore the court *a qua* had no power to determine whether, under section 1807, he had been guilty of fraud upon them or not. If so, then, for a like reason, the argument would be a good one that he could not be criminally prosecuted, because he *might* be proceeded against on a charge of fraud. In this way he might escape both the penalty of one statute and the punishment of the other. We cannot anticipate what *might* be the result of a prosecution of the insolvent in the future. Had he been convicted, and suffered the punishment therefor, and that proceeding been tendered as a bar to the present inquiry, we should have felt constrained to have passed upon the tangible issue thus formulated. At present we cannot.

The conclusion reached on this question necessarily disposes of the plaintiff's exception to the jurisdiction of the court *a qua*.

V.

Plaintiff's counsel insists that the provisions of section 1805 of the Revised Statutes of 1870 are in conflict with those of articles 2, 5, 6, 7 and 8 of the Constitution of 1879—denominated the "Bill of Rights"—and, therefore, unconstitutional and void.

There is but one essential difference between those articles of the present Constitution and the corresponding articles of the Constitution of 1868, which was in force when the statutes were revised; and that consists in the *proviso* to article 5, which declares that no person shall "be twice put in jeopardy of life or liberty for the same offense," etc. We have already reached the conclusion that the insolvent is not being prosecuted; and it does not appear that he has been prosecuted; consequently, it is manifest that this contention is groundless.

The quoted articles, with slight modifications, have been imported from the 4th, 5th and 6th amendments to the federal Constitution into our own, and the charge of unconstitutionality in that respect is equally groundless.

VI.

His further contention is that the plaintiff's arrest and confinement in pursuance of the provisions of the insolvent law, would be virtually an imprisonment for debt, and therefore illegal, because it has been abolished.

Under C. P. 210 *et seq.*, the arrest of a debtor is permitted while suit

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is pending, or until he shall give security for his appearance after judgment.

By the terms of C. P. 726 *et seq*, his imprisonment is permitted after judgment, under certain circumstances; and one of them is to compel him to make a surrender under the insolvent law. These statutes have been held not to conflict with the act of March, 1840, which abolishes the writ of *ca. sa*. *Anderson vs. Brinkley*, 1 Ann. 126 *Thornhill vs. Christmas*, 10 R. 543.

For a like reason we cannot perceive in what way section R. S. 1807 conflicts therewith; for it merely provides that when an accusation of fraud is brought against an insolvent debtor who has made a surrender and is found guilty, he shall be deprived of the benefit of the insolvent law and sentenced to imprisonment.

In *Northern Bank of Kentucky vs. Squires*, 8 Ann. 337, it was said that "it seems to be conceded everywhere to be well settled that State insolvent laws, as to contracts posterior thereto, are valid and binding between citizens of the State where such laws exist, with respect to contracts made and to be performed in that State."

It does not lie in the mouth of plaintiff, who is in court on his own petition, seeking the benefit of the insolvent law, to complain of its enforcement against him.

There is no question here as to whether the contract between him and opponents was to be performed in New York or Louisiana, for the reason that the latter have taken judicial cognizance of plaintiffs surrender, and joined issue with him in the courts of this State, and seek therein the enforcement of the insolvent law against him.

We do not regard such imprisonment as being an imprisonment for debt. This law has stood the test of half a century, and, in our opinion, does not conflict with the law abolishing the writ of *ca. sa*.

VII.

It is next strenuously urged by plaintiff's counsel that if fraud was perpetrated at all, by the insolvent, it was in New York, and that the same is not cognizable by the courts of this State. It is no doubt true, in principle, that one State cannot, in virtue of its criminal laws, punish acts committed against the laws of another State.

But, in the case of *Montesquieu vs. Hiel*, 4 La. 52, above cited, one of the questions presented was, whether proof of a theft committed in France, would support a charge of fraud made in the courts of this State, against an insolvent debtor who had made a surrender under our insolvent law.

On this question the court said: "As this evidence relates solely to a

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civil action, we are unable to perceive the force of the objection made to it, on account of proving a fraud committed in France. It is true that one State or Government will not punish crimes committed in another, by *public prosecution*, but it does not follow, as a necessary consequence, that an offender who flees from the State whence he committed the crime, shall be screened against pursuit by individuals whom he may have injured in the country where he has taken refuge.

"In relation to the civil suit he must be subjected to the laws of the latter place."

That decision is particularly applicable to the instant case, because the fraud complained of was begun in one State and consummated in another.

VIII.

Objections were urged on behalf of plaintiff to the judge's charge to the jury, but they were not particularly specified, nor set out in a bill of exception, and cannot, therefore, receive any consideration. The request made of the judge to prepare and submit his charge to the jury in writing, came too late, but he did subsequently reduce it to writing and file it in the record, and the demand was substantially complied with.

IX.

The application for a new trial, substantially embraces the various issues presented in the argument, and it was overruled by the judge *a quo*, after careful consideration; and our study of the case has impressed us with the correctness of his ruling.

On the trial thereof, plaintiff's counsel offered in evidence quite a number of letters and papers, in support of his contention, but same were rejected and disallowed, mainly for the reason that they were not introduced in evidence on the trial of the *case*; and there is no averment to the effect that these papers constituted newly discovered evidence. There is no warrant for such a practice and we approve of the rejection of this evidence.

We do not approve of that part of the judgment of the court *a quo* which taxes the cost against the insolvent personally. It should have been taxed against his estate. In all other respects we think the judgment is correct.

It is therefore ordered, adjudged and decreed that the judgment appealed from be so amended as to tax all cost against the insolvent's estate, and that it be in all other respects affirmed.

Succession of Smith.

No. 10,044.

SUCCESSION OF GEORGE L. SMITH.

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40	105
115	18

The Act of 1870, No. 87, does not authorize the appointment of the Public Administrator to the succession of a party dying intestate, where the heirs of the deceased are present or represented, and are in possession of the property left by him.

The circumstance that the succession is that of a resident of another State, composed of personal property, which by the law of the domicile vests in the administrator there, does not justify the appointment here, where the heirs oppose it.

The nature or title of such heirs and administrator is of no concern to the Public Administrator.

A PPEAL from the Civil District Court for the Parish of Orleans.
Monroe, J.

Gus. A. Breauz and *Wm. Grant* for the Public Administrator, Appellant.

Leonard, Marks & Bruenn for the Heirs, Appellees.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The only question presented is, whether the Public Administrator can be appointed to administer this succession.

G. L. Smith, who was domiciled in Arkansas, died there, leaving no will, owning property in that State and personal effects in Louisiana.

Parties claiming to be the sole heirs of Smith oppose the application, on the ground that there is no necessity for an administration; that the heirs are represented in this State and are in possession of the property left by the deceased therein; that the estate in Arkansas is under the charge of an administrator, and that the property in this State would fall under his administration.

One Parker joined in the application of the public administrator.

The District Court rejected the application and recognized the opponents as the heirs of the deceased, with certain eventual hereditary rights.

On appeal, the Arkansas administrator joins the opponents and appellees.

Parker, who had joined in the application for the administration, has ceased to be an actor in the case, judgment having been rendered in his favor, in a particular manner, from which he is not heard to complain.

There can be no doubt that had Smith died intestate, leaving personal property in this State over which creditors here could have exercised claims, and had he left no heir present or represented, there

Succession of Smith.

would have arisen a proper case for the appointment of the public administrator.

The facts are not so, however.

Smith apparently has left no creditors here. His heirs are represented by an agent and they are in possession of what property he has left in this State, whether in his name or not. They have besides been judicially recognized to be, as such, entitled to the possession of that property.

The administrator does not charge that this judgment of recognition is erroneous. The public administrator contends that, true if it be, that the heirs are in possession, this cannot avail them, as, under the Arkansas law, the personalty vests in the administrator and not in the heirs, who can receive the same only after due liquidation of the estate.

Of what concern can it be to the public administrator that this be or not so, in a case in which both the administrator and heirs oppose his appointment?

As well might he, in a case in which a surviving spouse in community and the children of the consort dying intestate, would oppose his prayer for appointment, urge that the naked ownership is in the latter and the usufruct or possession in the former. Surely in such a case he could make no show for appointment. Neither, then, can he here.

From the allusion made to the appearance of the Arkansas administrator, it is not to be inferred that his representative capacity is recognized, as that is not a factor in the decision, which hinges solely upon the presence of the heirs and their possession of the estate.

The purpose which the Legislature intended to accomplish when it created the trust of public administrator, was to provide for a prompt and safe custody of the property composing vacant successions, which otherwise might be exposed to ruin and devastation.

Hence it is that the law distinctly provides that it is only where the deceased has left no will appointing an executor, and where there are no heirs present or represented, that the public administrator can be put in charge of an unclaimed estate, and that, even where appointed, his functions cease on the recognition of the heirs.

It has accordingly been held that where the heirs have taken possession the public administrator cannot interfere. 28 Ann. 573.

It is clear to our minds that under this statute creating the office of public administrator, the contingencies under which the appointment claimed could have been conferred have not occurred, and that there is no error in the judgment complained of. Vide Act No. 87 of 1870, p. 120.

Judgment affirmed.

 Grabenheimer vs. Sheriff et als.

No. 10,109.

H. GRABENHEIMER VS. JOHN B. BUDD, SHERIFF, ET ALS.

The sheriff is responsible to the injured party for all damages occasioned through his negligence, malfeasance or misconduct or that of his deputies.

The party who obtains an attachment of his debtor's property, and realizes nothing thereby, because a second writ obtained against the same property is designedly executed in advance of his, by a deputy sheriff with full knowledge of the facts, is entitled to recover damages against the sheriff.

The measure of such damages is not the amount of his claim, if it exceeds the value of the debtor's property which the injured party intended to reach : but he cannot recover more than he would have received if the officer had done his duty.

A PPEAL from the Nineteenth District Court, Parish of Terrebonne.
Allen, J.

Knobloch, Moore & Badeaux for Plaintiff and Appellant.

L. F. Suthon and T. L. Winder, for Defendants and Appellees.

The opinion of the Court was delivered by

POCHÉ, J. The sheriff and his bondsmen are sued for damages in the sum of \$2113 91, alleged to have been caused to plaintiff through the malfeasance and misconduct of the sheriff's deputy. The judgment of the district court, resting on the verdict of a jury, was in favor of the defendants, and plaintiff appeals.

The facts are as follows :

Plaintiff, as creditor of one S. Simon, in the sum of \$2113 91, sued out, and obtained, a writ of attachment of his debtor's property, consisting of the contents of a country store, and placed the writ in the hands of the sheriff for immediate execution.

While the papers were being prepared, the counsel of another creditor of Simon, having been informed thereof by a deputy sheriff, hurriedly prepared papers for an attachment of the same property, which were completed in the attorney's office by the clerk of the court, who had been sent for through the same deputy sheriff.

Hiring a fleet horse, counsel placed the writ which he had thus obtained in the hands of this deputy sheriff, with special instructions to hurry to the store, at a distance of eleven miles from the court-house, and to serve the process in advance of the service to be made by the sheriff of the writ first obtained by plaintiff's counsel, and first placed in his hands.

The plan was carried out, and the attachment under the second case, subsequently filed, had been executed by the deputy when the sheriff reached the store, and the result was that the entire contents of the

Grabenheimer vs. Sheriff et als.

store were absorbed by the attachment issued in the second suit, and that plaintiff took nothing by means of his process.

Under the plain text of the law, and in keeping with numerous adjudications on the subject, it is an undeniable proposition that the sheriff is responsible in damages to the party injured through the malfeasance, misconduct or delinquency of his deputy. C. P. Art. 764; Revised Statutes, sec. 3594; Wilkins vs. Bobo, 13 Ann. 430; Marshall vs. Simpson, 13 Ann. 437; Bogel vs. Bell, 15 Ann. 163; State ex rel. Attorney General vs. Budd, sheriff, 39 Ann. 232.

According to the showing made by the record in this case, the unquestioned right in law of the plaintiff, Grabenheimer, was that his writ should have been executed before the attachment sued out in the second suit, filed on that day, against the common debtor; and under that state of things he would have been entitled, as fruits of his legal vigilance and of his ranking seizure, to the proceeds of the debtor's property, which were otherwise absorbed by the creditor in the second suit.

He had taken all the legal steps necessary to a fair accomplishment of that result, and as he has been illegally thwarted in his lawful design the question recurs to trace the cause of his defeat, resulting in a clear loss.

The record answers that the cause was the illegal and very reprehensible conduct of the deputy sheriff who served the second creditor's process, with the avowed intention and design of "beating" the first attachment; and according to law the sheriff "remains responsible" therefor.

The acts performed by the deputy in his official capacity, are the acts of the sheriff, and although the latter was designedly kept in ignorance of his deputy's movements in the premises, the law holds him as rigorously responsible, as if both writs had been placed in his own hands, and he had wittingly given an illegal preference to one of the writs over the other.

It is part of a sheriff's duty to have his deputies under proper control, and to see that they honestly and impartially perform their official duties.

Having concluded that the sheriff is liable to plaintiff in the premises, we must now fix the quantum of damages.

Plaintiff's counsel contend that the amount of his claim \$2113 91, is the measure of damages, and they rely on the provisions of section 3594 of the Revised Statutes, which provides, in substance, that the party injured, through the failure, neglect or refusal of the sheriff, in

Becnel vs. Waguespack.

connection with such writs, is entitled to recover the full "amount owing on the claim sued on."

But manifestly that provision of the law must be construed with reference to the hypothesis that under the circumstances of the case, the whole "amount owing on the claim sued on," could have been satisfied out of the debtor's property which escaped through the negligence or misconduct of the sheriff or his deputies.

The law means to compel the sheriff to indemnify the injured party, but it surely could not intend to coerce him to guarantee the claim sued on.

The instant case very aptly illustrates the distinction which courts must observe in the application of the law.

All the property of Simon, the debtor, was attached under the process hereinabove described, and at the sale made thereunder, it realized as clear proceeds, after deducting costs, taxes and the lessor's privilege, the insignificant sum of \$215 25.

That is the sum which plaintiff would have realized if his process had been served as it should have been, and that sum is therefore the extent of the loss which plaintiff has sustained through the fault of the sheriff.

The rule is settled that in such cases the injured party cannot recover more than he would have received if the officer had done his duty. *Marshall vs. Simpson*, 13 Ann. 437; *Bogel vs. Bell*, 15 Ann. 163.

It is, therefore, ordered, adjudged and decreed, that the judgment appealed from and the verdict of the jury be set aside and annulled, and it is now ordered that plaintiff do have and recover judgment in the sum of \$215 25, with legal interest from judicial demand, against John B. Budd, sheriff, and his official sureties, John D. Wright and Henry C. Duplantis, jointly and severally, with recognition of mortgage on the defendant Dudd's property, according to sec. 4 of act 52 of 1880, and that he recover his costs in both courts.

No. 10,103.

MICHEL A. BECNEL VS. JOSEPH WAGUESPACK.

The evidence in the case fails to establish the claim with that certainty required to support a judgment.

When a co-owner of indivision of immovable property brings an action in his own name for the entire damage done to the estate by a trespasser, the citation in such suit will avail to interrupt prescription as to the other co-owner who afterwards intervenes and joins in the action. The suit was necessarily for his benefit, entitling him to an account from the plaintiff in case of recovery, and it informed defendant of the entire cause and object of the claim and of the titles on which it was founded.

40	109
120	225

Beonel vs. Waguespack.

A PPEAL from the Twenty-sixth District Court, Parish of St. John the Baptist. *Rost, J.*

O. O. Provosty for Plaintiff and Appellee.

W. J. Waguespack and *R. G. Dugué* for Defendant and Appellant.

Bérault & Chenet for Intervenor.

The opinion of the Court was delivered by

FENNER, J. The plaintiff claims \$15,000 for 3000 trees alleged to have been cut by defendant on his land.

The petition affords no better description of the *locus* of the alleged trespass than the simple setting out the metes and bounds of a track belonging to plaintiff of about 2000 acres, and no more particular designation of the time than the allegation that it was committed "during the high water of 1884."

That high water was occasioned by the Davis crevasse, which is shown to have occurred on March 8, 1884, and lasted through the month of June.

An exception was taken on the ground, amongst others, that the petition did not state with sufficient certainty the time when and place where the acts charged were committed. This exception was overruled; but the defect complained of assumed importance in view of the defendant's subsequent plea of prescription, because the citation was not served until after May 13, 1885, and it became important to know whether the acts charged were committed before or after that date in 1884, inasmuch as the prescription applicable is that of one year. The impossibility of determining from the allegations of the petition whether the plea of prescription is applicable or not, serves to establish the seriousness of the exception, and its overruling left open a nice question as to whether the burden of proof devolved on plaintiff to establish that the acts were done within the prescriptive term or on defendant to show that they were done without it.

It is not necessary to determine this question here, but for future guidance see *Powers vs. Foucher*, 12 Mart. O. S. 70; *Hubnall vs. Watt*, 11 Ann. 57.

But the vagueness and uncertainty exhibited in the petition and in the proof as to date, extend to the whole evidence in the case.

We have been at pains to read it with great care and we find it im-

possible to hold that plaintiff has established his claim with anything approaching that degree of certainty which is essential to support a judgment.

Plaintiff and defendant own contiguous lands in the swamp, and during the overflow both had hands employed in cutting timber on their respective estates. A large number of other persons were also engaged in cutting timber in the swamp.

No witness is produced who ever saw any of defendant's hands cutting on plaintiff's land. There is no direct or positive evidence of the trespass charged of any kind. Plaintiff's whole case rests on inference drawn from the fact that at certain points the cutting on defendant's land seems to have extended across the line of plaintiff. But the evidence of defendant's plantation manager shows that he visited the hands a number of times during the cutting and always found them within his line and warned them against crossing the defendant's line, and nobody proves that they ever did cross it. It was certainly possible that others might have committed the trespass, and it is not brought home to defendant. The trespass seems not to have been discovered until long after its commission when defendant's vagrant wood-choppers had scattered and the means of proving the actual facts had been lost to both parties.

Plaintiff has no doubt suffered a loss, but he "must have grounds more relative than this" before he can compel the defendant to make it good.

As the judgment must be of non-suit only, we are compelled to review that part of the judgment appealed from which sustained the plea of prescription as against the intervention of Lezin Becnel.

The suit was originally brought in the name of M. Becnel only, who sued as sole owner of the land and claimed the whole damage for the trespass.

It subsequently transpired that Lezin Becnel was an undivided co-owner of the land and he thereupon filed an intervention alleging that fact and joined in the demand. This intervention was not filed until long after the lapse of the prescriptive term, and the plea of prescription as against the intervenor was sustained by the judge *a quo*. The correctness of this judgment depends on whether the intervenor was entitled to the benefit of the interruption resulting from the citation on the principal demand. We think he was, under the authorities cited by his learned counsel and others.

The suit was by one undivided owner against a trespasser, and

Iron Works Company vs. Reuss.

claimed the damage to the entire property by the trespass, and is assimilated to the right of such a co-owner to bring a petitory action for the whole property against a trespasser, which has been maintained. *Pearson vs. Grice*, 6 Ann. 232.

If plaintiff had recovered it would have enured to the joint benefit of his co-owner, who could have compelled him to account. The action clearly indicated to defendant the entire cause and object of the claim and the titles on which it was founded, which was sufficient to interrupt prescription as to both the co-owners. *Flower vs. O'Connor*, 17 La. 213; *Blanc vs. Dupré*, 36 Ann. 847; *Satterlee vs. Morgan*, 33 Ann. 846.

We shall reverse the entire judgment appealed from and replace it by a judgment of non-suit against both plaintiff and intervenor, leaving the rights of all as they were before the suit.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed, and it is now adjudged and decreed that there be judgment rejecting the demands of both plaintiff and intervenor as in case of non suit at their proper cost in the lower court, the costs of appeal to be divided between plaintiff and defendant.

No. 9882.

THE WHITNEY IRON WORKS COMPANY VS. GEORGE B. REUSS.

When manufacturers oblige themselves to furnish machinery to a planter of first-class material and workmanship and free from damaging defects, and guarantee the work for one year, and that same shall be first erected in their shops, as far as practicable, in order that the planter, or his engineer, may inspect the same before their delivery on board of steamboat at the port of New Orleans, for shipment to him, and on due notification he makes the inspection, and thereafter receives and uses said machinery, the burden of proof is on defendant to establish the following facts, viz:

- 1st. That the workmanship and material were not of first-class; but, on the contrary, same were affected with damaging defects;
- 2d. To reconcile his apparent, and implied acceptance of the mill and machinery, resulting from his use of same in bearing off his crops, with his claim that some were in many essential particulars defective, both as to workmanship, and material;
- 3d. To establish by clear, and satisfactory evidence that the mill and machinery had received "fair usage" at his hands, otherwise he cannot defeat his contract to pay the price.
- 4th. Holding under such a contract a large and valuable property, the defendant not having established the *conditions precedent*, is not entitled to delay proceedings for the purpose of having heard the evidence of his witnesses as to the *quantum* of damages.
- 5th. A judgment taxing cost is an interlocutory decree, though rendered after the judgment in the cause, and separately signed; but same cannot be revised or reviewed in case the evidence in support of it has not been reduced to writing, and is not in the record.

40	112
47	224
40	112
49	1360
40	112
107	72
107	80
40	112
110	428

A PPEAL from the Twenty-second District Court, Parish of Ascension. *Duffel, J.*

David N. Barrow, for Plaintiff and Appellee.

E. N. Pugh and *R. N. Sims*, for Defendant and Appellant.

The opinion of the Court was delivered by

WATKINS, J. This suit was brought to enforce specific compliance with the terms of a contract of sale, made to the defendant of certain machinery for the manufacture of sugar and molasses.

The same consisted of a five-roll mill and an engine, with all the necessary gearing, fixtures and appurtenances to make it complete and fit it for manufacturing operations, and all of which are carefully detailed in the written specifications, which were submitted to the defendant and accepted by him on the 8th of May, 1884, with some slight modifications.

After enumerating with great particularity the length and diameter of the rolls; the thickness of the shells; the material and diameter of the shafts and journals; the fashion and pattern of the flanges; the character and composition of the bed-plates, cane knife, king-bolts, and juice-pans, among others, the specifications set out the following *special covenants* on the part of the corporation, viz :

1. That all material and workmanship shall be of first-class, and free from damaging defects.

2. That the work is guaranteed for one year under fair usage.

3. That the liability of the corporation is limited to repairing any defective, or broken parts, in the shortest possible time.

4. That the defendant is fully guaranteed against any infringement of patents.

5. That plaintiff will "erect all of said machinery in their shops, as far as practicable" in order that defendant, or his engineer, may inspect the same before shipment.

6. That said company will furnish a full set of blue-print drawings for the mill and its foundations.

7. That it will deliver all the machinery f. o. b. of steamboat in this city, and have same ready for shipment on, or before the 1st of September, 1884.

The price stipulated was \$15,750, payable in four equal installments, for which the defendant consented to execute his promissory

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notes, payable respectively on the 20th of December, 1884, and February, April and June, 1885, and indorsed by John Reus.

The defendant agreed to furnish two of those notes when the machinery was ready for shipment, and the other two on the 1st of October, 1884.

The plaintiff company avers that the mill, engine and all the machinery were completed according to contract, and delivered in good order on a steamboat in the city of New Orleans for shipment; and that same were received by the defendant, and shipped to his Germania plantation, and erected in his sugar-house.

That, in conformity with the contract, the company previously erected said machinery, in its shops, and that it was there examined and inspected by John Reus and J. C. Lear, engineer, for the defendant; and same were by him accepted.

The company avers full compliance with all the stipulations of the contract, and that it is entitled to have and receive said notes from the defendant, who has failed to comply with his part of same, and has refused to furnish or deliver said notes, notwithstanding he has been repeatedly requested so to do; and prays judgment compelling defendant to comply therewith, and furnish said notes, and for a money-judgment against him for such part of same as shall become due during the pendency of this suit, with recognition of vendor's lien on the property.

The company also demands \$794 as the value of extra work, and the restitution of certain tools and implements loaned to the defendant, or their alternate value.

The defendant pleads the general issue, and admits the execution of the contract; but denies that plaintiff has carried it out, on his part, in good faith. He avers further, that the company has done no act thereunder which entitles it to a specific performance, or the payment of the price.

He further avers that many parts of said machinery were constructed of defective material; that the workmanship was bad and rough; that scarcely any piece of machinery would fit after being transferred to the sugar-house; and that, after being therein erected, said machinery, as a whole, in the defectiveness of material and workmanship, "stood and stands as a reproach and disgrace to the prevailing improved methods and facilities for the construction of plantation machinery."

He denies that he, or any person for him, ever accepted any part of said machinery in plaintiff's shops in New Orleans, as alleged.

He avers that he discovered the defectiveness of portions of said

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machinery after same had been shipped, and promptly notified the plaintiff company and made complaint.

The answer there specifies, among others, the following defects in the mill and machinery, to wit:

1. That the blue-print drawings for the foundations were incorrectly made, and caused him a loss, in material and extra work, over \$400.

2. That during the grinding season the bed-plate of the three-roll mill was broken, owing to the insufficiency of the foundation bolts and washers.

3. That both of the shafts of the two-roll mill became loose.

4. That the intermediate carrier failed to deliver the bagasse.

5. That five of the cogs in the cast-iron pinion—which the contract required should be of steel—were broken on account of the defectiveness of the material.

6. The juice-pan of the three-roll mill was made too short and narrow, in consequence of which the cane-juice ran over, and beyond the edge of the pan, and over the journals, and much of it was lost or wasted.

7. That the patent cut-off, or joy-valve, that was attached to the engine so that the steam could be cut off at any point of the stroke, would not work; nor would the reversing-lever operate well.

Defendant also avers that after much loss of time and great expense for labor he was compelled, in order to prevent the total loss of his crop of 1884, to employ and use said machinery to bear it off.

That through the fault and negligence of plaintiffs in the non-performance of its part of said contract, in the particulars specified, he has suffered damages to the extent of \$10,000 for the year 1884, and a like sum for 1885.

That plaintiff's full and complete compliance with the terms of the contract was, and is, a condition precedent to his recovery of him; and that he refused to deliver to plaintiffs his notes on the ground that the machinery furnished was greatly defective, both as respects material and workmanship.

He prays judgment rejecting all of plaintiff's demands at his cost and for judgment in his favor on his reconventional demand.

The pleadings are quite elaborate and difficult of satisfactory analysis, but we have endeavored to furnish a fair and concise synopsis of the demands and counter-claims of the parties to this intricate and abstruse litigation.

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It is apparent from the foregoing statement that the three important questions for determination are :

1. Was the workmanship and material of first class, and free from damaging defects ?
2. Did the mill and machinery receive fair usage at the defendant's hands while same was in process of erection in his sugar-house, and while it was in his possession and being operated by him ?
3. Did plaintiff company furnish a full set of blue-print drawings for the mill and foundations, as stipulated in the contract ?

I.

The burden of proof is upon the defendant to establish that the workmanship and material were not first-class, but were affected with damaging defects ; because the opportunity had been afforded him of inspecting the machinery in the company's shops before shipment.

Having accepted delivery of the goods, and shipped them to his plantation and erected them in his sugar-house, and used the same in bearing off the crops of 1884, 1885 and 1886, it became defendant's duty to reconcile his apparent and implied acceptance of the mill and machinery, resulting therefrom.

Defendant must also show affirmatively that the mill and machinery received fair usage at his hands while in course of erection and subsequent operation.

While the defendant, in his answer, does not formally demand the annulment of the contract, in whole or in part, on account of the vices and defects enumerated, it is in effect the action *quantum minoris*, set up by way of a reconventional demand.

II.

On the trial all of the various issues presented by the pleadings were traversed by the testimony of various witnesses—experts and non-experts—with the exception of defendant's reconventional demand, proof of which was resisted by the plaintiff company in the court below, and successfully, as the defendants' numerous bills of exception will show.

In this court his council urgently press them upon our attention and ask us to review them and reverse the rulings of the judge *a quo*.

They are to the effect that he tendered various witnesses by whom to prove, among others the following items of damage, viz :

1. Damages suffered by him during the grinding season of 1884, "on account of the bad condition of the machinery furnished by plaintiffs."

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2. The loss and damage caused by, and which was the direct result of "the damaging defects in the machinery made by the plaintiffs."

3. The damages and injury sustained by reason of defective plans furnished by plaintiffs for the erection of the foundations of the mill and engine; and the defective construction of said foundation, and in cost of labor and material.

4. The cost of removing defective parts of said machinery out of the sugar-house; the transportation to New Orleans; and of replacing the same, including engineer's labor, cost of other labor, handling freight to and from New Orleans—said defective parts embracing the two-roll mill, the broken bed-plate, the intermediate carrier, patent joy-valve, etc.

5. The cost of repairs incurred by him during the year 1885, and aggregating about \$1500.

6. To prove "all and singular the allegations in this answer relating to the loss sustained in 1884."

The Court refused to admit this mass of evidence upon the ground that under the reservation in the contract, viz :

"We will guarantee our work for one year, under fair usage, limiting our liability to replacing any defective or broken parts, in the shortest possible time."

The plaintiff company can, *under no circumstances*, be held for anything beyond the cost of replacing the broken parts of the machinery made by them; and that any damage resulting from defectiveness of material or workmanship must be borne by the defendant.

But, in the present condition of the case, it is manifestly to the interest of all parties that we should first look into the record, and examine the testimony, and determine whether the defendant has established, by a clear preponderance of evidence, that the workmanship and material of the mill and engine were *not* of first class, but were affected by damaging defects; and that the mill and machinery had received fair usage at his hands while in the course of erection and subsequent operation.

We shall therefore postpone consideration of the judge's rulings until that is done.

III.

The district judge tried the case, and heard and knew the witnesses—or very many of them—and the section of the State in which he presides is one in which the cultivation and manufacture of sugar and molasses is a prominent industry, and it may be presumed that he is

Iron Works Company vs. Reuss.

quite familiar with the subjects dealt with in this case; therefore, great weight must be attached to his opinion.

He says: "Planters and carpenters, overseers and bricklayers, *so-called* engineers, have all had their say.

"They noticed the frequent stoppages of the mill; they saw the broken plate and loose roller-shafts, the overflow of juice and the dropping cane—but few of them could explain or give the scientific causes for the effects they saw; because, not being competent experts but being non-professionals, and having made no serious study of engineering, or mechanism, used in sugar-houses, they could advance naught but their own crude opinions.

"Over this mass of evidence (700 pages) we have gone several times; have carefully condensed it; grouped it, and analyzed it; have spared no pains in the study of the case—and we have had ample time to study it."

He then found the following substantial facts established:

That the plaintiff company did replace all defective or broken parts of the machinery within the shortest possible delay; said broken parts having been sent to their domicile in New Orleans by the defendant, from time to time, when said breakages occurred; and that plaintiffs' employees were repeatedly sent to defendant's Germania plantation to aid him in the erection of the machinery.

He says: "Plaintiffs' witnesses, Scott, Cummings, Wilbreth, Pearson, Duncan, Flowers, Ormsby, Vannot, McMahon, Taylor, *et als.*, all *experts*, who have, many of them, aided in the construction of several sugar mills, *all agree* in saying that the material and workmanship of defendant's mill are (of) *first class* and *free from damaging defects*; that it is a most powerful one; and that extra expense and labor were lavished in its build in order to make it a model engine; and, in fact, these witnesses say, and so do Tilton and Pandelly, that this machinery is well finished and *perfect*.

"These witnesses minutely explained how the roller-shafts were fitted; the tonnage of pressure used in doing so—which they all agree in saying were sufficient to make a good and tight fit.

"They showed the working of the engine in all of its parts; and of the automatic joy-valve; the pressure of the gearings, or bearings; the setting and use of the scrapers; the proper angle, or stand of the carrier and the causes which, in their opinion, loosened the shaft, and broke the bed-plate."

He says that even if equal weight were given to the testimony of defendant's *non-professional* witnesses, "the evidence of plaintiffs

would largely preponderate over it, and of the additional testimony of Dupuy, Ricker, Lear and Smith."

He then proceeds to particularize the different witnesses of defendant, and give their statements in detail.

He says that James C. Lear, Sr., and Smith, by reason of their long training and experience in the direction and running of sugar mills, are justly entitled to be considered as expert witnesses.

It was the former who put up the mill and engine. In speaking of of the evidence, he states: "The loose shaft was discovered two or three weeks after Lear, Sr., had turned over the machinery to an engineer who had *never before conducted* a five-roller mill, and whose assistant, Dugas, was a *carpenter, not an engineer*."

"A serious doubt is raised here whether, in such unskillful hands, this ponderous machinery received *fair usage*."

"Lear, Sr., says, a shaft should not be loose, except by *accident*. The question there is, was it loosened by accident, or by improper filling at the foundry? It was proven that the shaft was fitted with a 240-tons hydraulic pressure, and that, *one fitted thus, should not get loose, except by unfair usage, or by accident of some sort*."

He says that Smet and other witnesses testified "that if bagasse be permitted to accumulate on the rollers, in the manner that other witnesses say it did, then it would act upon the rollers with a pressure that would be straining and injurious, and this was *not fair usage*."

He states that Smith says that the scrapers were adjusted on the plantation by the engineer, who set the angle to suit himself, and that they did not do their work well.

That "the breaking of the plate might have resulted from the *driving of a key, by choking of the mill, or a certain jar, while handling the mill*."

There is no witness who states at what time, or in what way this break occurred.

The judge says that the proof shows that the pinion proved to have been of *iron* instead of *steel*, as stipulated in the specifications; but that does not disclose any bad faith on the part of the company; that they had themselves been deceived; and *no serious* injury had resulted to defendants therefrom. He held the company bound to substitute a *steel* pinion in place of the one of iron.

After an apparently most careful and, to our thinking, impartial consideration of the testimony, the synopsis of which is given, the judge concluded, by saying:

"Defendant has failed to prove damaging defects. Those trifling

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ones, incidental to all machinery, and which could easily have been remedied on the plantation, and were not, could not give rise to, or justify the *extraordinary* demand of the defendant."

Again: "Defendant has jotted down every break, every leak, every vibration of his machinery, and has allowed his imagination to run away with his better judgment, and magnify his ills.

"Plaintiffs have proved *most conclusively* that their whole machinery except the *iron pinions*, was first-class in workmanship and material.

"In rebuttal, defendant has only raised slight doubts of defectiveness of parts of machinery which were, after full investigation, set aside."

He thereupon rendered judgment against the defendant for \$15,750 with 8 per cent. interest, pursuant to the terms and installments of the contract; but he provided in the decree that the execution of it should be stayed until the plaintiff company should replace the iron pinions with steel ones.

The decree recognizes and enforces plaintiff's vendor's lien and privilege on the mill, and all the machinery, engine, etc., and directs that same be seized and sold to pay and satisfy the demands of the plaintiff by preference, with all costs.

He also gave judgment against the defendant for some further small amounts, in pursuance of the petition, and of their correctness, there seems to be no well-grounded complaint.

We have been at the pains to read the record, and closely scrutinize the testimony of the witnesses, and have reached the same conclusion the district judge arrived at.

We are of the opinion that the workmanship and material, by the plaintiff company employed in the construction of the mill and engine, with the exception stated above and reserved, was "of first-class, and free from damaging defects;" and we are not satisfied that the mill and machinery received fair usage at the hands of the defendant, during time of the erection thereof in the sugar-house, nor during the course of its subsequent operation, and the bearing off of defendant's crops of 1884, 1885 and 1886.

We are, therefore, dispensed from deciding the exceedingly delicate and difficult questions that are presented in defendant's numerous bills of exceptions, and by us referred to in the preceding paragraph of this opinion.

While it is perfectly true, as a general proposition, that the court will not control parties as to the order in which they shall introduce evidence, yet, in the instant case, we felt bound, for the manifest pur-

poses of justice, to decide the other questions in the case, which appeared to us to be decisive of the controversy; and our examination has fully satisfied us of the correctness of that view.

IV.

The defendant made application for a new trial, on various grounds, which in their general character address themselves to the sound discretion of the judge *a quo*. One of them was that he was not permitted to introduce proof of the *quantum* of damages; but it has already been disposed of. But defendant is certainly entitled to \$76 00 for the "loss of brick, sand and cement."

The lower judge correctly refused a continuance for the purpose of giving the defendant an opportunity to procure the testimony of additional witnesses residing in the parish, and not theretofore summoned by him. He does not allege that their testimony has just come to his knowledge.

We do not think the district judge exercised his discretion improperly.

V.

The plaintiff and appellee filed a motion to dismiss defendant's appeal, because of certain suggested defects and imperfections in the make-up of the transcript, but which we did not notice, for the reason that a satisfactory transcript was subsequently furnished by the appellant.

He also sought to dismiss a separate and supplemental appeal, from a judgment taxing costs in behalf of certain expert witnesses, because the amount of that particular decree is not sufficient to give this court jurisdiction. We do not regard the one drawn in question as a final judgment, but as an *interlocutory decree*, forming a part of the final judgment rendered in the case.

The law requires that "the costs of the clerk, sheriff, witnesses' fees, cost of taking depositions, and copies of acts used on the trial, and all other costs allowed by the court, shall be taxed as cost." R. S., sec. 750.

We can examine the question raised as forming an integral part of the controversy.

The defendant makes the point that alleged expert witnesses were never regularly summoned or appointed by the court; but that they *voluntarily* appeared as ordinary witnesses and gave their testimony. But the record is barren of evidence on the subject. Possibly it was

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not reduced to writing. That was their privilege. We would, under this state of facts, be unwarranted in disturbing the decree.

We are of opinion that the judgment of the court *a qua* is correct, except in one particular—the defendant is certainly entitled to credit for the sum of \$76 00.

It is, therefore, ordered and decreed, that the judgment appealed from be amended and reduced by the sum of \$76 00, and that as thus amended it be affirmed with cost of appeal taxed against plaintiff and appellee.

DISSENTING OPINION.

POCHÉ, J. From the preponderance of the evidence it appears to my mind that plaintiffs have not complied with the stipulations of the contract with the defendant, and that they are therefore not entitled to recover the full amount of their claim.

The record shows, in my opinion, that the greater part of the accidents and breakages which have occurred to the machinery which they furnished to defendant must be attributed to damaging defects in said machinery, mainly inferior materials, weak and light metals used in the construction thereof.

It is conceded by the learned judge of the district court that plaintiffs failed to comply with an important stipulation in the contract, which called for steel pinions, in place of which they furnished cast-iron pinions, thus causing a serious breakage in that part of the machinery and entailing grievous injury on the defendant.

It is also shown that owing to the insufficient chains for the cane-carrier, furnished by plaintiff, defendant has been compelled to furnish chains of his own from his old mill in order to be able to use that carrier, which is an important factor in a sugar mill, to which it is the sole and exclusive feeder.

Defendant's contention as to the insufficient size of the juice-pans is not even controverted by the plaintiffs and the judgment makes no provision for that defect, which is certainly a very damaging shortcoming, since it exposes defendant to constant loss of cane-juice, which is the very substance of sugar making.

The preponderance of the evidence also shows that the looseness of the shaft of one of the rollers of the two-roller mill must be attributed to defective workmanship and to the use of too light and too weak material in its construction.

The effort made by plaintiffs to prove unfair usage and unskilful handling of that particular part of the machinery is not a success. It

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consists in the main of expert testimony of mechanics who express the opinion that the accident is due to the agglomeration of bagasse around the rollers, which hardens by accumulation and friction, thus loosening the shell of the roller from its shaft. But none of these witnesses ever spent as much as a day at that sugar-house while the mill was in operation, and their opinion cannot destroy the positive testimony of defendant's overseer, of his two engineers, who state in detail the means employed in running the mill, the attention given to those two rollers, and who state that a man was stationed there charged with the special duty of scraping the bagasse off the rollers and of thus preventing the very cause to which the expert witnesses trace the accident; and besides, the record contains the testimony of other and equally competent expert witnesses who state that the cause referred to would not result in the loosening of the roller from the shaft, but that such an obstruction would break the coupling or the cog-wheels; and to my mind that opinion carries more weight, as it rests on practical experience.

Now it appears, from defendant's motion for a new trial and from affidavits filed in support thereof, that since the trial had begun below a very important part of the machinery gave way, and that thereby the mill has become unfit for use without repairs, and on this vital fact defendant rested his application for a new trial, during the course of which he offered to show by the testimony of experts that this and other accidents and breakages in that machinery were the result of damaging defects in the material used and in the construction thereof.

In my opinion it was error to refuse that new trial, and under the effect of that ruling this court is deprived of indispensable testimony bearing on the crucial point in the controversy. The motion for a new trial was supported by the affidavit of a scientific machinist who had made an examination of the machinery with a view to detect the proximate cause of this last breakage, and who is entirely disinterested in the cause.

For those reasons, and for others too numerous to mention in this opinion, I think that the judgment appealed from should have been reversed and that the cause should have been remanded for another trial, with a view to ascertain and determine the pecuniary extent of defective machinery furnished by plaintiffs under their contract, so as to deduct the same from the contract price. 9 Ann. 273, *Goodloe vs. Brooks*.

I therefore dissent from the opinion and decree of the majority.

Mr. Justice Todd concurs in this opinion.

Board of Harbor Masters vs. Railroad and Steamship Company.

No. 10,040.

BOARD OF HARBOR MASTERS OF NEW ORLEANS VS. MORGAN'S LOUISIANA AND TEXAS RAILROAD AND STEAMSHIP COMPANY.

The legislation relative to harbor masters has no application to vessels entering the port of New Orleans, loading, unloading or making fast to private wharves on the right bank of the river, placed by law under the exclusive management and control of the owners thereof.

The duties imposed and rights conferred upon the harbor masters are not susceptible of being performed or exercised at the wharves of the company, to whom the exclusive management and control of the same has been entrusted by legitimate authority.

The failure to have ever set up claims for services and to have proved that such were rendered, tell significantly in favor of the company.

A PPEAL from the Civil District Court for the Parish of Orleans;
Tissot, J.

J. R. Beckwith for Plaintiff and Appellee :

I.

All of the provisions of sections eight and nine of article one of the federal constitution are intended to confer powers and impose restraints upon congress and the general government, and do not impose any restrictions or restraints upon the several States. Restraint upon States is contained in the tenth section of Article one. This was expressly determined in *Morgan vs. Louisiana*, 118 U. S. 455-467, affirming *Passenger Cases*, 8 How. 283-541; *Brig Wilson vs. United States*, 1 Brock. 433-432; *Butler vs. Hopper*, 1 Wash. U. C. 499; *Pennsylvania vs. Wheeling Bridge Company*, 18 How. 431, 435; *Munn vs. Illinois*, 94 U. S. 113, 135.

II.

There are State regulations for improvement of river and harbor facilities, and regulations adopted in the exercise of the supreme police authority of the States within their boundaries, and dues or taxes imposed to carry such purposes into effect that have the effect to regulate commerce, that are valid until displaced or contravened by some legislation of Congress.

Morgan vs. Louisiana, 118 U. S., approving *Wilson vs. Blackbird Marsh Co.*, 2 Pet. 245; *Cooley vs. Board of Wardens*, 12 How. 299; *Gilman vs. Philadelphia*, 3 Wall. 713, 727; *Pound vs. Turk*, 95 U. S. 459, 462; *Hall vs. DeCuir*, 95 U. S. 485-488; *Packet Co. vs. Catlettburg*, 105 U. S. 559, 562; *Transportation Co. vs. Parkersburg*, 107 U. S. 691, 702; *Escanaba Co. vs. Chicago*, 107 U. S. 678; and *Huse vs. Glover*, 119 U. S. 543.

III.

The power of States to regulate vessels in its own harbors, and police its own ports, and appoint harbor masters for that purpose, and impose dues on vessels to carry out such regulations, is a power residing in the States, lawfully exercised unless contravened or prohibited by some general law of Congress. *Gloucester Ferry Company vs. Pennsylvania*, 114 U. S. 196, 214.

IV.

It is no defense to a demand for harbor master's dues or against a penalty for resisting the lawful order of a harbor master to move a vessel from its mooring at the wharf, that the defendant owns or controls the wharf as his own private property. *Vanderbilt vs. Adams*, 7 Cowen 349, approved in *Gloucester Ferry Company vs. Pennsylvania*, 114 U. S. 196, 215.

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Levy & Blair for Defendant and Appellant :

The testimony shows that defendant's wharves are on the west bank of the river, remote from the actual port, are private wharves used by defendant and necessarily, from their peculiar structure and business, used by it exclusively. That its right to own and control its wharves is derived from the Statutes of 1853 and 1877, being the charters of defendant, and also by virtue of its riparian rights resulting from ownership of the land, long before the annexation of Algiers to New Orleans. It is also proved, and apparently not contradicted, that the harbor masters have never performed any service for defendant or offered to perform any, and that the officers of the company have never seen any of the harbor masters at or near its wharves; and it is also shown that no public wharves exist on the west side of the river; and that the actual work and jurisdiction of the harbor masters have never been extended to the west side of the river. Under these circumstances, we contend that the act of 1877 (extra Session, p. 104) and other Statutes relied on by plaintiffs, are null and void, because they conflict with the following provisions of the U. S. Constitution :

1. Art. First, Section 10, § 3: No State shall, without the consent of Congress, levy any duty on tonnage.
2. Article First, Section 8 § 3: Congress shall have power * * * "to regulate commerce with foreign nations, and among the several States and with the Indian tribes." 27 Ann. 414; 31 Ann. 65; 6 Wall. 31; 19 Wall. 581; 20 Wall. 580; 94 U. S. S. C. 238, 248; 95 U. S. S. C. 89, 580; 100 U. S. S. C. 423, 430, 114 U. S. 196.
3. The power to regulate commerce is exclusively vested in Congress. 9 Wheaton 186; 12 Wheaton 414; 12 Peters 72; 6 Wall. 31; 94 U. S. S. C. 246; 100 U. S. S. C. 434.
4. Because they violate Article 1, Sec. 9, § 5, which declares that no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to or from one State be obliged to enter, clear or pay duties in another. Even Congress is prohibited from enacting such statutes. 94 U. S. S. C. p. 243; 100 U. S. S. C. p. 434; 107 U. S. 702.
5. The power granted by special statutes to defendant was for a public purpose, to-wit: a railroad purpose. 27 Ann. 414; 11 Ann. 161; 3 Wall. 364; 5 Wall. 772; 15 Wall. 667; 19 Wall. 661; *Ellerman vs. N. O. and Chatt. R. R.*, 105 U. S. 166; *Mills on Eminent Domain*, Sec. 46.
6. The Statutes, so far as it is attempted to apply them to defendant in this case, are null and void, because they impair the obligation of the contract by which, for and in consideration of constructing the road, the State granted wharf franchises, of which it is sought to deprive defendant.
7. Defendant, as riparian owner, even without special grants, possessed the right to build wharves for its own use in front of its property. 31 Ann. p. 65; 6 Ann. 450; 5 Ann. 36; 20 Ann. 308; C. C. 455, 457, 452, 863; *New Orleans vs. Ellerman*, United States Supreme Court, March, 1882; 1 Black 23; 7 Wall. 272; 10 Wall. 502; 21 Wall. 389; 1 Eng. Law Reports, Appeal Cases, 662.
8. And this is a right of which riparian proprietors cannot be divested, except by legal proceedings, and for adequate compensation, nor without existence of necessity for public use. 5 Central Law Journal 267; 1 Black. 23; 105 U. S. 166; 10 Wall. 502; 18 La. 122; 20 Ann. 308; 27 Ann. 414; C. C. 863.
9. The power to construct, maintain and control its own wharves, was granted to defendant and its vendors by several acts of the Louisiana Legislature, and among others, by the following: Acts 1853, p. 119; 1853, p. 328; 1855, p. 212; 1858, p. 196; 1877, p. 37.
10. Harbor master fees cannot be collected where no special service is performed. 94 U. S. 243.
11. Railroad wharf rights are necessarily exclusive. 105 U. S. 166.

Board of Harbor Masters vs. Railroad and Steamship Company.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is an action for harbor master's fees, specified in an itemized bill.

The claim is based upon the act of 1856, incorporated in the Revised Statutes, under Nos. 1679 to 1690, and it rests also on act No. 64 of 1877, and on rules and regulations adopted by the board of harbor-masters.

The defense is: exemption from such fees, under the legislative charter granted the defendant and under chartered privileges acquired by it, by purchase, from the assignee of a previous corporation.

It is further urged that the statutes relied on impair the obligations of the contracts, contained in the charters, and thus violate both the Federal and State Constitutions.

It is also claimed that the statutes levy a duty on tonnage, regulate commerce and give a preference to the ports of our State over those of another and thus contravene the Constitution of the United States and are null and inoperative.

Finally, it is claimed that the fees could be demanded only when services have been actually rendered.

From an adverse judgment the company appeals.

It is needless to pass upon all these defences.

An examination of the laws upon which the plaintiffs rely, which were passed at a time when the port of New Orleans did not practically extend to the right bank of the river, satisfactorily establishes that they were not originally intended to apply to vessels entering those waters and landing at private wharves on that side of the stream and under the exclusive control of the owners thereof.

The wharves of the defendant are situated on the right bank of the river, where there exists no public wharf. They have never been used by any other vessels. They have been so constructed and are covered with rails, and accessible in such a manner, as to afford convenience to none other but the vessels of the company. No vessel ever claimed the right of making fast to them. They have ever been used exclusively by the company.

Under the charter granted the company by the Legislature in 1877 (No. 64), and also under privileges long previously accorded to the New Orleans, Opelousas and Great Western Railroad Company, and which were transferred to Charles Morgan, who subsequently conveyed them to the company, the exclusive management and control of the wharves, etc., was conferred on the defendant, to be exercised as it

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may deem most expedient and for its welfare, subject only to the police powers of municipal corporations. (Sec. 3.)

Premitting the question whether those privileges and immunities could or not be recalled, it is apparent that Act No. 64 of 1877, determining the fees of the harbor-masters, does not purport to suppress or abridge them in any manner.

Reference to the laws concerning harbor-masters shows that the duties which they may fulfil relate to the assigning of position to vessels at the wharves, in certain cases, and are of such a nature or character that the vessels of the company are not, under the law, subjected to the supervision of those officials, as they cannot be placed under different concurrent and possibly conflicting authorities.

It is besides proved that no services were rendered to the defendant, and that since the creation of the body of harbor-masters, the present is the first attempt to collect from it fees, as due to the latter.

The omission to have claimed such fees is indicative of the construction placed upon the laws on the subject, as well by the plaintiffs as by their predecessors, and tells adversely to them.

It is therefore ordered and decreed that the judgment appealed from be reversed, and that there now be judgment for defendant, with costs

No. 10,064.

ROBERT N. COCHRANE vs. MRS. ALICE DICKENSON.

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The transferee of a negotiable instrument, such as a promissory note made payable to the order of the maker and by him endorsed in blank, holds the instrument clothed with the presumption that it was negotiated for value in the usual course of business, before maturity and without notice of any equities between the prior parties to the instrument. That presumption is not rebutted by proof that the notes had been negotiated by an agent of the maker, contrary to the latter's instructions, who had left them in the possession of the agent for future negotiation according to special instructions to be given, and which were never given, without proof that such circumstances were made known to the transferee at the time, or in default of evidence tending to show that the transferee was not in good faith.

A PPEAL from the Twenty-sixth District Court, Parish of Jefferson.
Rost, J.

G. A. Breauz and H. E. Upton for Plaintiff and Appellant:

1. The renewal of a note and mortgage between the same parties, though the interest which has accrued be added to the principal, is no novation. It is but a continuance of the same transaction. Novation is the substitution, either of a new creditor, a new debtor, or a new debt. C. C. 2185; *Rosenda vs. Zabriska*, 5 N. S. 157; 4 R. 493; 34 Ann. 534. But receiving new notes operates no novation. *Hobson vs. Davidson*, 4 Mart. 431; *Poth-*

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ler Oblig. No. 559; Merlin Rep. de Jur. Novation, § 5; Parson's Notes and Bills, Vol. II. p. 205, note.

The renewal note is of the same illegitimate progeny as the first. Edwards on Bills and Promissory Notes, pp. 351, 352.

2. Where the original note is without consideration, a note given in renewal thereof is likewise without consideration. Copp vs. Sawyer, 6 N. H. 386; 5 Pick. 391; Parsons on Notes and Bills, pp. 178 and 179.

Neither the rendition of an account nor giving of notes can prevent the defendant from showing errors and inquiring into the consideration of a note in a suit against him. 16 Ann. 240; 13 Ann. 234, 413; 12 Ann. 20; 26 Ann. 668; 23 Ann. 312.

3. The rule of law, that he who takes a note over due and dishonored, takes it encumbered with all the equities between the prior parties to it, is the law of Louisiana, as well as of those States which have adopted the common law. 6 Wall. 492.

The purchaser or pledgee of negotiable instruments after maturity, whose rights are derived from one who was not the owner, and who was not authorized to sell or pledge, acquires no right or title thereto, or thereupon, as against the true owner. Stern Brothers vs. Germania National Bank, 34 Ann. 1119, and authorities: C. C. 2252. The sale of a thing belonging to another person is null. This applies to past due obligations to pay money, as well as other property. 28 Ann. 70; 31 Ann. 215; 7 Wall. 700; 21 Wall. 143; 10 Wall. 90; 4 Peters, 321; 99 U. S. 440; 26 Ann. 556; 13 Ld. 214.

The doctrine is invoked, that where one of two innocent parties must suffer, the loss should fall on the one who enabled the third party to commit the fraud. This objection to the application of the principle now under discussion is not new. 34 Ann. 1121. It has been made, considered and overruled, both by the Supreme Court of this State and the Supreme Court of the United States. 6 Wall. 493; 28 Ann. 70; 34 Ann. 1121.

4. Where the existence of the consideration is expressly put at issue and doubt or suspicion cast upon its reality, the burden of proving it is thrown upon the payee. 15 Ann. 41.
5. To fix acquiescence on a party, it must unequivocally appear that he knew, or had notice of the fact upon which the alleged acquiescence is founded, and to which it refers. * * A recognition resulting from ignorance of material facts goes for nothing. The question as to acquiescence cannot arise unless the party against whom it is set up was aware of his rights. A man cannot be said to acquiesce in what he does not know, nor can he be bound by acquiescence, unless fully apprised of his rights and all the material facts and circumstances of the case. Nor, indeed, is a recognition of avail which assumes the validity of a transaction, if the question as to its validity does not appear to have come before the parties. Kerr on Fraud and Mistake, pp. 300 and 301, and authorities cited. The acts from which ratification is to be deduced must evince such intention clearly and unequivocally; none will be inferred when those acts can otherwise be explained. Rivas' Heirs vs. Bernard, 13 L. 169 (176); Copeland vs. Michie, 17 L. 286.

To bind a man by ratification, it must appear that he knew with precision what act he was ratifying, and what defect he was waiving. Knight vs. Mentz, 23 Ann. 538.

6. Where the legal principle is confessedly doubtful, and one about which ignorance may well be supposed to exist, a person, acting under a misapprehension of the law, will not forfeit any of his legal rights by reason of such mistake. In "fraud," as distinguished from "mistake," there is necessarily a misapprehension or mistake in the party defrauded, which alone would not vitiate his dealings with others; but there is the additional circumstance that the party, with whom he deals, intentionally causes the mistake for the purpose of effecting the dealing, and this precludes the party so occasioning the mistake from holding the other bound to it. Kerr on Fraud and Mistake, pp. 399, 406, and authorities.

Money paid voluntarily under mistake of fact, is recoverable both at law and in equity. Kerr on Fraud and Mistake, p. 415, and authorities.

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Error in law, as well as error in fact, invalidates a contract, where such error is its only or principal cause. R. C. C. Art. 1846.

Fraud, as applied to contracts, is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantages to the one party, or cause an inconvenience or loss to the other. R. C. C. Art. 1847.

Fraud, like every other allegation, must be proved by him who alleges it; but it may be proved by simple presumptions, or by legal presumptions, as well as by other evidence. The maxim, that fraud is not to be presumed, means no more than that it is not to be imputed without legal evidence. R. C. C. Art. 1848.

7. Parol evidence is admissible between the parties to show error in an act of mortgage. The doctrine of estoppel cannot be extended to a case of that description, particularly in a suit brought to correct the fundamental error which arises between the original parties, and especially when the plea is urged by the representatives of the party against whom error is charged, and who is represented by them as having fraudulently caused the error. 36 Ann. 549; 33 Ann. 1036, and authorities cited.

It is a universal rule of jurisprudence that parol testimony is admissible to defeat written contracts when fraud is alleged; and error is often akin to fraud. 35 Ann. 561; 36 Ann. 550, and authorities cited.

Leovy & Blair for Defendant and Appellee.

The opinion of the Court was delivered by

POCHÉ, J. The object of this suit is to enjoin an executory process sued out by the defendant, as the holder and owner of four promissory notes, amounting together to \$10,400, which notes are alleged to be null and void for want of consideration, and as having been obtained from plaintiff by the defendant by means of fraud and through misrepresentation.

Plaintiff alleges that, on the 2d of February, 1882, he executed two promissory notes, of \$5000 each, payable one year after date, and signed an act of mortgage, intended to secure the payment of said notes, which he left in the possession and custody of the late William J. Castell, a notary public, before whom he signed the act of mortgage aforesaid, and whom he instituted as his agent, for the purpose of negotiating said notes, at some future time, under his instructions, whenever he would need the amount of money which they were intended to secure. He then states that, although he had never authorized the actual negotiation of the notes, they were found in the possession of defendant, a short time after the death of Castell, which occurred on the 14th of November, 1885, the same having been illegally and wrongfully negotiated by said Castell to said defendant, long after their maturity, and without consideration to him, plaintiff in injunction.

He then represents that on the 30th of November, 1885, he executed the four notes sued on by the defendant, intended to represent the

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aforesaid two notes of \$5000 each and accrued interests, which he secured by an act of mortgage of the same date, in error of his rights, through unlawful and fraudulent representations and without consideration. Hence, he contends that the new notes, being tainted with the same nullity which characterized the original notes of \$5000 each, he is not liable for the same.

The defence is substantially that the two notes of \$5000 each, which were in form negotiable instruments, transferable by delivery, were acquired by defendant from William J. Castell before maturity, and for valuable consideration, equal to the face value of the same, and that said notes remained her lawful property until the 30th of November, 1885, when they were surrendered or returned to plaintiff in exchange for the four notes now held by her and now in suit. She also avers that from the month of May, 1882, at which time she purchased said notes, until September, 1885, her aforesaid notes, together with other valuable papers, were left by her for safe keeping in the custody of said Castell, through whom, as defendant's agent, she annually received payment of the interests becoming due on said notes, amounting in the aggregate to \$2400.

She further states that, at the instance of plaintiff, she accepted, in lieu and stead of said notes, the four notes now in suit, secured by mortgage executed on the same day, November 30, 1885, on condition, required by plaintiff, that said new notes be made payable in one, two and three years from date, and of her allowing a mortgage in favor of another creditor of plaintiff, to secure a debt of \$5000, of the same rank as the mortgage which secured her aforesaid notes.

She, therefore, contends that, by executing said new notes and mortgage, by paying a portion of one of said notes, without objection, and by other similar acts, plaintiff has fully ratified the act of his agent, Castell, in negotiating the original notes of \$5000 each.

The judgment below was in favor of defendant, and plaintiff appeals.

The uncontested facts of the case are as follows: Plaintiff had for many years been a constant client and customer of the late W. J. Castell, with whom he had close and confidential business relations, consisting in notarial business, and also in negotiating loans of money, represented by notes intrusted to him for that purpose, which notes were generally secured by means of mortgages executed before Castell, as a notary. Castell had many other similar clients for whom he negotiated loans on notes and mortgages, similarly executed, and

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it appears that, in his usual dealings in that capacity, he had previously negotiated sundry notes to Mrs. Dickenson, the defendant herein.

Now, in reference to the particular transaction involved herein, the record shows that plaintiff, in anticipation of an approaching want of funds, signed, on the 2d of February, 1882, two notes, of \$5000 each, payable one year after date, to be secured by mortgage on a valuable piece of property (the same which is now under seizure), in furtherance of which he affixed his signature to a blank printed form of mortgage generally used by Castell, leaving the notes in the latter's possession, as his agent, for the purposes of future negotiation in accordance with the instructions to be given to the agent by him.

The notes remained in the physical possession of Castell until the month of September, 1885, during which interval the maker of the notes, on several occasions, in answer to his inquiries, was informed by Castell that they had not yet been used or negotiated.

The act of mortgage was never completed, and was found after Castell's death in the same unfinished condition in which it had been left by Cochrane on the 2d of February, 1882.

About a week after the death of Castell, Cochrane discovered that the notes were in the possession of, and held by, the defendant, Mrs. Dickenson, who soon thereafter made demand for the payment of the same. After consultation with their respective counsel, the parties agreed upon the contract evidenced by the act of mortgage of November 30, 1885, as hereinabove stated.

The amount of the capital (\$10,000) was represented by three notes of equal amounts, payable in one, two and three years, and the sum of \$800, representing interests on the two retired notes of \$5000 each, from the 2d of February, 1885, to the same day and month of 1886, was incorporated in a fourth note, payable on the 31st of March, 1886.

At the maturity of that note, plaintiff made a part payment of \$410 on the same, and claimed the indulgence of defendant for time to meet payment of the balance due thereon.

All the other pertinent facts in the case are seriously contested, and the truth must be sought out of very conflicting testimony. As a result of the foregoing statement of uncontested facts, the legal attitude of Mrs. Dickenson, touching the two original notes of \$5000 each, at the date of the new contract, on November 30, 1885, was that of the holder of negotiable instruments, from which flows the presumption, well established in American jurisprudence and resting on

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commercial law, that they were negotiated "for value in the usual course of business at the time of execution, and without notice of any equities between the prior parties to the instrument." *Collins vs. Gilbert*, 94 U. S. Reports, p. 754; *Fairen vs. Bier*, 37 Ann. 824; *Saloy vs. Hibernia National Bank*, 39 Ann. 90.

The burden of proof to support plaintiff's contention that the notes were negotiated long after maturity, so as to open the door for evidence of equities between Castell and himself, is therefore on him.

The elements of his evidence on the point consist of his own testimony, going to show that the execution of the notes and his signature to the projected act of mortgage were mere initiatory steps towards a future negotiation of the notes, not to be affected in the absence of new and special instructions to that effect, which he never gave, going also to show that, on several subsequent occasions, Castell had assured him that the notes which he exhibited to him had not yet been used or negotiated, the last occasion being within six months or one year at most previous to Castell's death. He also relies on the projected act of mortgage which was never completed, and stands yet without the signature of the notary.

As that evidence is uncontradicted, it must be held sufficient *prima facie* to rebut the presumption in favor of defendant's acquisition, and to shift the burden of proof on her to substantiate her averment that the notes had been acquired by her before maturity.

This requirement is met by her own testimony, in which she states that some time in April, 1882, she called on Castell, informing him that she desired to make an investment of funds, and asking him if he had any good mortgage paper on hand for disposition in that way. Castell then offered her the two notes, of \$5000 each, in question; but she then only had \$5000 on hand, which were not sufficient for the amount of the notes. But as she expected soon to realize additional funds, it was agreed that by handing \$5000 to Castell he would hold the notes for her, which was accordingly done. A few days afterwards she produced the additional amount of \$5000, and the transaction was then closed, the two notes having been then and there delivered to her by Castell. But before leaving his office she concluded to leave the notes in his custody for safe keeping, where they remained, subject to her order, until some time in September, 1885, at which time she took them in her own possession, for the reason that she feared that Castell would die in a short time. His death occurred on the 14th day of November following. She states that in February of each of the years 1883, 1884 and 1885 the interests

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due on the notes were settled with her by Castell, as the agent of the maker, giving her credit in a running account which he had with her, embracing other moneyed transactions operated between them, and endorsing the fact of such payments on the back of each note at each settlement.

Her testimony is corroborated by several incidents shown by the record, among which are the following:

The first sum of \$5000 handed to her by Castell was by means of a check, which he filled up in his own writing for her, made to her order and endorsed by her, on which she drew the money and immediately brought it over to him; the check, dated 22d of April, 1882, is in the record.

The second sum of \$5000 handed to Castell was in a check, under date of May 3, 1882, for \$3440, drawn, executed and collected in the same manner; in a sum of \$350 in currency, and finally in a bond valued at \$1210, accompanied by a memorandum, shown to be in his handwriting, containing an addition of the figures \$3440 and 1660 = to \$5000.00. The two notes in question also contain the endorsed payments of interest at each of the dates hereinabove stated.

An extract from the books of Castell also shows that defendant's account with him was credited with the interests corresponding with the amounts and dates as endorsed on the notes.

The record also contains a certificate made out and signed by Castell, who therein acknowledges that, among other valuable papers, he held, on July 1, 1884, for, and as the property of, Mrs. Dickenson the two Cochrane notes of \$5000 each. And all this is additionally corroborated by the testimony of defendant's daughter who was present at Castell's office on several occasions when the settlement of interests took place, and the same were entered on the back of the notes. This same witness was also present at her mother's house when Cochrane, on the 3d of April, 1886, made the part payment of the interest note of \$800, on which occasion he uttered no complaints against the acts, doings and transactions of Castell, his agent in the premises, and when, in answer to defendant's inquiry, he stated that he had not received *all* of the amount for which his note had been negotiated.

Her testimony is in the main corroborated by that of her brother, who, in addition, relates two conversations which he had with Cochrane in reference to this business, in which the latter took occasion to explain the reasons for which he had issued the two notes in question, and during neither of which he ever intimated that there was anything wrong about the transaction through which Mrs. Dickenson

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son had acquired the ownership of those notes. In the attempted refutation of all that evidence which is actually overwhelming, when considered with reference to the difficulties which surrounded the defendant by reason of the death of Castell, the most important factor in the case, plaintiff's sole reliance is on his own testimony, and on circumstances of doubtful aspect and of suspicious appearance.

The leading fact deduced from his testimony, which is to the effect that Castell had repeatedly informed him that his notes had not yet been used or negotiated, and that he exhibited them to him on each of those occasions, is not essentially incompatible with the fact that the notes had really been acquired in good faith by Mrs. Dickenson. That circumstance is satisfactorily explained by the proof in the record that after her purchase of the notes Mrs. Dickenson had left them in the custody of Castell, at his own suggestion and for reason which are too plain and too apparent to require any further elucidation.

He also invokes the fact that in the paraph of one of the notes the date is February 2, 1884, instead of 1882, which is the date in the paraph of the other note and of the execution of both. We attach no importance to that circumstance, which is either a clerical error, or a fraudulent design of plaintiff's agent intended to the detriment and not to the advantage of Mrs. Dickenson.

She dealt with him in absolute good faith and in full trust in his judgment as well as in his honesty, having been entirely guided by her confidence in his representations as to the validity of the mortgage, of plaintiff's titles to the property, its value on the market, and in all matters touching the value of the securities which she was buying. As the act of mortgage is avowedly incomplete and conferred no rights whatever, the date of the paraph on the notes loses all significance, at least in so far as it is invoked to assail Mrs. Dickenson's good faith. Nor do we find any element of fraud in her conduct throughout the negotiations which led up to the contract of November 30, 1885. True she did not inform plaintiff or his counsel that the act of mortgage of 1882 had never been completed. But he does not pretend that he was ignorant of that fact, which was as much within his reach as in that of Mrs. Dickenson. His own testimony shows how he discovered the whereabouts of his notes, which was by inquiry at the office of the custodian of all of Castell's papers. He says himself that he was advised by his counsel that he was liable on the notes because they were held by a third person, and that his whole line of conduct was thereafter shaped under the sense of that responsibility.

All the foregoing considerations logically lead to the conclusion

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that the two notes of \$5000 each had been purchased by Mrs. Dickenson from Wm. J. Castell before maturity, for valuable consideration, in good faith and without the slightest knowledge or intimation of any irregularity or defect in his possession and control of the same. Hence we hold that plaintiff was liable on said notes, and that he is legally bound by the contract of November 30, 1885, by which he did, as he manifestly intended to, ratify the act of his agent in the previous transaction. *Givanovich vs. Citizens' Bank*, 26 Ann. 15 and authorities hereinabove referred to. The case is therefore with the defendant.

Judgment affirmed.

No. 9997.

MEYER WEILL.—MECHANICS AND TRADERS' INSURANCE COMPANY VS.
MRS. MARY ANN LEVI ET AL.

Where a fund exceeding \$2,000, realized by the sale of mortgaged property, is in the hands of the sheriff, and the whole fund is claimed by the seizing creditor, and \$1,000 of said fund is claimed by a third opponent in preference to said creditor, this Court has jurisdiction of the case.

The controversy involves the distribution of the entire fund.

Where the minutes of the court show that the motion for the appeal and the order thereon granting the appeal were made in open court, parol evidence is inadmissible, in the absence of any averment of fraud or error, to contradict the record. The record is conclusive.

Sections 128 and 2897 of the Revised Statutes confer no privilege upon real estate in favor of attorneys at law for their professional fees in obtaining judgment maintaining the title and possession of defendants in a petitory action.

The moment such a judgment becomes final its object is attained, and nothing remains to which a privilege could attach.

A PPEAL from the Civil District Court for the Parish of Orleans.
Voorhies, J.

Singleton, Browne & Choate and Percy Roberts for Plaintiffs and Appellants.

W. S. Benedict, Chas. Louque and Farrar & Kruttschnitt for Defendants and Appellees.

ON MOTION TO DISMISS.

The opinion of the Court was delivered by

TODD, J. The motion rests upon two grounds:

1st. Want of jurisdiction; and

2d. Want of proper order of appeal.

The plaintiffs seized and sold certain real estate of the defendant,

40	135
48	703
49	1458
40	185
50	473
40	135
117	979

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which realized \$13,000. A third opposition was made claiming \$1,000 out of that amount in preference to the plaintiffs.

The contest relates exclusively to the distribution of a fund exceeding \$2,000. The plaintiffs claim the entire fund.

It has been decided in a similar case that this Court had jurisdiction. *Renshaw vs. Stafford*, 34 Ann. 1138.

The third opponent, who is appellee, claims that the motion of appeal was not made and granted in open court; and for the purpose of showing this, he obtained from this Court a qualified order authorizing the court of the first instance to receive evidence on the subject.

The minutes of that court show that the motion was made and allowed in open court.

The order for the reception of evidence by the lower court reserved the right of the appellant touching the admissibility of the evidence.

An entry on the minutes may, in exceptional cases, be attached and declared null, but this could only be done for causes and reasons which have not been alleged in the instant case.

Under the showing made, the proof adduced by the appellee is inadmissible and cannot be considered.

The minutes as they stand conclude him. 4 N. S. 176; 14 Ann. 726; 34 Ann. 1117.

The motion is therefore denied.

ON THE MERITS.

WATKINS, J. The plaintiffs, as mortgage creditors of the defendant, Mrs. Levi—Meyer Weill for the sum of \$5,000, and the Mechanics and Traders' Insurance Company for \$10,000—in separate executory proceedings, caused the mortgaged property to be seized and sold; and the sum of \$13,500 was realized, an amount insufficient to satisfy their demands.

In each of these proceedings Charles Louque filed an intervention and third opposition, in which he claims the sum of \$1,000, with privilege on the mortgaged property superior in rank to the plaintiffs' mortgages, as compensation due him for professional services rendered Thomas J. Sellers, a former owner, in maintaining his title to the property sold.

Thomas J. Sellers, as third opponent, claims the sum of \$200 for rice straw fed to the stock on the plantation, while it was under seizure, to be paid him in preference to all others.

These claims were first made in the suit of Meyer Weill vs. Mary Ann Levi—this plaintiff having made the first seizure—and, on the

trial of the *concurus* thus formed, the judge *a quo* gave judgment in favor of Louque in full, and of Sellers for \$100, and recognizing their privileges as superior to those of the mortgage creditors; and the latter have appealed.

Louque seeks to recover for professional services rendered to the defendant in the petitory action, entitled F. E. Trepagnier vs. Thomas J. Sellers, in which plaintiff's claim of title was successfully resisted, and that of defendant maintained. During the pendency of this suit the defendant, Mrs. Levi, purchased the property from Sellers, at the price of \$32,801.73, which was represented in great part by her assumption of a previously existing and duly recorded mortgage of Sellers. Her title was registered in the book of conveyances on the 14th of January, and the Sellers mortgage was registered in the mortgage office on the 5th of January, 1884. Louque's affidavit, stating his lien and privilege on the judgment (then recently rendered) and on the property, was recorded in the book of mortgages on the 11th of January, 1884. The two mortgages in favor of the appellants were in part concurrent, and executed by Mrs. Levi on the 15th of April, 1884.

If Louque's demand is well grounded in law, it ranks that of the seizing creditor's, as it was first recorded. The Sellers mortgage assumed by Mrs. Levi as a part of the purchase price of the property has been paid and discharged; and she, having been divested of title by a judicial sale, is without interest in this controversy. Louque's affidavit was recorded prior to Mrs. Levi's title. His reliance is placed on the provisions of Revised Statutes, sections 128 and 2897, which are as follows, viz: "A special privilege is hereby granted in favor of attorneys at law for the amount of their professional fees *on all judgments* obtained by them, to take rank as a first privilege thereon." His contention is that the judgment he obtained for Sellers, decreeing him the owner of the property, conferred upon him a privilege on the *property*; while that of the appellants is, that the privilege is restricted to the *judgment*.

The statute in terms confers "a special privilege * * * in favor of attorneys at law on * * * all *judgments* obtained by them." Privileges are *stricti juris* and cannot be extended by inference to other objects than those mentioned in the statute granting them. Guided by this familiar rule of interpretation, our conclusion is that opponent Louque's demand is unfounded and should have been rejected in the court below. In our opinion this statute was not intended by the Legislature to confer upon an attorney at law a lien or privilege upon his

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client's property, real or personal, for professional services rendered in the maintenance of his possession or ownership thereof.

In a recent case, *Luneau, tutrix, vs. Edwards, adm'r*—decided at Opelousas, *vide* 39 Ann. 876—we employed the following language: "The privilege granted by law, in Section 128 of the Revised Statutes, in favor of attorneys at law, for the amount of their professional fees, on all judgments obtained by them, cannot be extended so as to affect property which the creditors may have acquired in execution or satisfaction of the judgment. When the judgment has been satisfied it ceases to have a legal existence, and hence it cannot be applied to any privilege or other legal purpose."

In the case of *Trepagnier vs. Sellers*, the judgment maintained the defendant's title and possession. The moment that judgment became final its mission was ended and its object attained, without the issuance, even, of a writ of possession. It was a judgment of that class which recognizes the *status* of a thing, and which ceases to have a legal existence the moment it is created—except as a muniment of title—and to which a lien or privilege could not attach.

The claim of Sellers rests mainly on the evidence of witnesses, whose testimony was heard and considered by the judge of the court below, and we are not prepared to differ from him in his appreciation of it.

It is therefore ordered, adjudged and decreed that the judgment of the lower court in favor of the opponent, Charles Louque, be reversed at his cost, and that the judgment in favor of T. J. Sellers be affirmed; and that the cost of appeal be shared ratably by appellants and Louque.

No. 10,054.

PEOPLE'S BANK VS. HARRY CAGE ET ALS.

When the vendor transfers the notes for the price, for a valuable consideration, to a third person without endorsement and without recourse or warranty, his right and power to demand or receive payment of the price ceases to exist, and with it his right to demand a resolution of the sale in event of non-payment, and the corresponding obligation of the buyer.

Every obligation is the correlative of a corresponding right, and when the right is destroyed the obligation is equally extinguished.

The modes of extinguishing obligations mentioned in C. C. 2130 embrace only those general ones applicable to all obligations, and are not exclusive of a multitude of other particular causes of extinguishment applicable to each peculiar kind of obligation.

The subsequent reacquisition of the notes by the vendor does not operate to revive this obligation which had been thus extinguished.

40 138
47 1242
40 138
107 394

A PPEAL from the Nineteenth District Court, Parish of Terrebonne.
Allen, J.

H. C. Cage for Plaintiff and Appellant.

Braughn, Buck, Dinkinspiel & Hart for New Orleans National Bank,
 Defendant and Appellee.

Samuel L. Gilmore for Hibernia National Bank, Defendant and
 Appellee:

1. A restoration or an offer of restoration of the amount received on account of the purchase price is an absolute condition precedent to an action to resolve a sale for non-payment of price. This restoration or offer of restoration must be alleged and proved by the plaintiff in the action as an indispensable preliminary to his suit and cannot be avoided by his attempting to show or by his showing, that the rents and revenues of the property are worth more than the amount he has received on account of the price. *Latham vs. Hickey*, 21 Ann. 425; *Lee vs. Taylor*, 21 Ann. 514; *George vs. Knox*, 23 Ann. 354; *Heirs of Castle vs. Floyd*, 38 Ann. 587; *Hennen's Digest*, page 1090, No. 19.
2. A sale cannot be annulled for the non-payment of a portion of the price, where the parties, from their transactions, have rendered it impossible to place each other in the same situation they were in before the sale. *Leflore vs. Carson*, 7 Ann. 65. See also cases on the doctrine that transferor cannot compete with transferee. *Howard vs. Schmidt*, 29 Ann. 133-4; *Barkdull vs. Herwig*, 30 Ann. 621; *Abney vs. Walmsley*, 33 Ann. 589.
3. The right to sue for the resolution of a sale of property for non-payment of its price is transferable by a special contract to that effect. *Heirs of Castle vs. Floyd*, 38 Ann. 583; *Hamilton vs. State National Bank*, *Southern Reporter*, page 196.
4. A sale of the notes representing all the unpaid balance of the price of the property transfers the resolatory action to the purchaser of the notes when such sale is accompanied by an act subrogating the purchaser of the notes to all the rights, actions and remedies the vendor had by virtue of the act of sale of the property and giving him authority to exercise these rights, actions and remedies in the same form and manner as the vendor himself.
5. The sale of the notes representing the unpaid balance of the price of the property extinguishes and terminates in the vendor the right to sue for the resolution of the sale. He is paid the price in the money he receives for the notes, unless he keeps the debt for the price alive for the benefit of the purchaser of the notes by a special contract conveying the right to the resolatory action.

The opinion of the Court was delivered by

FENNER, J. On January 7, 1876, the People's Bank sold to Harry Cage certain immovable property for a price of \$8000, of which \$1000 was paid in cash and the rest was represented by six equal promissory notes, secured by mortgage and vendor's privilege, and falling due respectively in the years 1877 to 1882, both inclusive. All but the last two notes were paid.

In 1884, after their maturity, the bank transferred these two notes (which were payable to Cage's own order and by him endorsed) to

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Gidière, Day & Co., executing at the same time a notarial act reciting that it had received in cash the full amount of the notes, that the transfer was made "without recourse on said bank or warranty of any kind," and also containing the clause that the bank does, "moreover, cede, transfer and assign to said Gidière, Day & Co. all of said bank's rights and interest in and to said notes, and to the mortgage securing the same, hereby subrogating the said Gidière, Day & Co. in and to all of said bank's rights, mortgages, actions, liens, privileges and remedies, to which it is entitled, under and by virtue of the provisions, clauses and conditions in said act of mortgage contained, to be by the said Gidière, Day & Co. enjoyed and exercised in the same manner and to the same extent as they could have been by the said People's Bank itself."

A few days thereafter, Cage executed in favor of Gidière, Day & Co. a mortgage to secure two notes of \$8500 each, which are now held respectively by the Hibernia National Bank and the New Orleans National Bank.

Subsequently, Gidière, Day & Co. discounted their own note in the People's Bank, as security for which they pledged the two original mortgage notes of Cage, which they had bought from the bank; and, later, by the foreclosure of this pledge, the bank again became the owner of said notes.

Having suffered its mortgage to lapse by failure to reinscribe, it brings the present suit to resolve the sale for non-payment of the price represented by said notes, to which it makes Cage and the Hibernia and New Orleans banks parties.

Various interesting questions are presented in argument, but it is apparent from the face of the foregoing statement that plaintiff has no case.

Under our law the resolutive condition implied in all commutative contracts gives to the seller of property the right to dissolve the sale in case the buyer fails to pay the price. C. C. 2046, 2561.

Undoubtedly in every contract of sale there is tacitly embodied an obligation on the part of the buyer to restore the thing sold to the seller, on the latter's demand, in case he fails to pay the price.

It is now well settled that this obligation is, in some sort, personal to the seller and does not pass with the transfer of the notes representing the price to a third person, at least without a special transfer of this particular obligation with subrogation. *Hamilton vs. State National Bank*, 39 Ann.; *Castle vs. Floyd*, 38 Ann. 583; *Swan vs. Gayle*, 24 Ann. 503.

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We need not now definitely decide whether this peculiar obligation is transferable at all, or whether, if transferable, the language of the notarial subrogation quoted in this case was sufficient to embrace it. If it was transferred to Gidiere, Day & Co., it is clear that it was never retroceded by them to plaintiff, and hence he has no standing to enforce it.

But if it did not pass to Gidiere, Day & Co. it is equally clear that the obligation was extinguished by the transfer of the notes by the seller, for a valuable consideration, without recourse or warranty.

Had the plaintiff remained bound as endorser on the notes, the case might have been different. But the transfer without recourse completely severed his connection with the contract of sale otherwise than as warrantor of the title to the buyer; and, leaving him without right or interest to demand payment of the price, equally destroyed his right to demand resolution of the sale on the ground of non-payment. Every obligation is the correlative of a corresponding right; and when the right is destroyed, the obligation necessarily falls with it.

This seems plain enough in reason and common sense, and is only confused by the groundless assumption on the part of plaintiff's counsel, that obligations can only be extinguished by one of the nine modes mentioned in article 2130 of the Civil Code, and by his claim that, as not one of those modes has operated to extinguish this obligation, it must, *ex necessitate rei*, continue to exist.

The fallacy of this argument will be exposed by a brief quotation from Marcadé's commentary on the corresponding article of the Napoleon Code:

"Besides these general modes, there is a multitude of other causes of extinguishment peculiar to each special kind of obligation. Thus the obligation of a tutor to take charge of the person and property of his ward ceases, not only by the death of either, but also by majority or emancipation of the minor, or by the destitution or excuse of the tutor; my obligation to discharge the mandate which I have accepted ends not only by death, but also by my renunciation or by your revocation of the mandate, etc. These are methods of extinguishment peculiar to particular obligations, which the law does not concern itself with in a title consecrated to the general principles common to all obligations." 4 Marcadé, p. 508.

In the instant case, at the moment when the vendor parted with the right or power to demand or receive the payment of the price, he lost the right to enforce the penalty of resolving the sale because of non-payment, and the correlative obligation was necessarily destroyed.

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This would hardly be questioned had Gidière, Day & Co. remained owner of the notes. But the vendor's reacquisition of the notes could not revive an extinguished obligation.

For extinct obligations there is no resurrection. New ones may be created, but the dead rise not again.

Judgment affirmed.

No. 9873.

IN THE MATTER OF ORLOFF LAKE, PRAYING FOR A WRIT OF POSSESSION UNDER A TAX TITLE, AND THE THIRD OPPOSITION AND INJUNCTION OF JOHN LESLIE.

Section 2 of Act 82 of 1884, which declares that a tax title executed before a notary shall be conclusive evidence of the following facts:

- 1st. That the property was assessed according to law:
- 2d. That the taxes were levied according to law:
- 3d. That the property was advertised according to law:
- 4th. That the property was adjudicated and sold, as recited in said deed:
- 5th. That all of the prerequisites of the law were complied with by all the officers, from the assessment up to and including the execution, and registry of the deed to said purchaser,—was only intended to conclude enquiry into the non-essential requisites to the exercise of the taxing power.

The provisions of that section necessarily imply that all the jurisdictional prerequisites have been complied with: and if, in point of fact, they have not, the tax title does not preclude an action of nullity based on non-compliance therewith.

The Legislature had ample power to enact such a statute, and the act in question is not open to the objection of unconstitutionality urged against it.

A PPEAL from the Civil District Court for the Parish of Orleans.
Tissot, J.

Joseph H. Spearing, for Plaintiff and Appellant.

Frank Hebert, for Defendant and Appellee.

M. J. Cunningham, Attorney General, and *James C. Moise* as *Amici Curie*.

Braughn, Buck, Dinkelspiel & Hart, and *B. R. Forman*, on the side of Defendant and Appellant.

ON REHEARING.

The opinion of the Court was delivered by

WATKINS, J. On the 14th of September, 1885, Orloff Lake became the adjudicatee of the following-described property, viz: "Twenty-six (26) certain lots of ground in the Sixth District of the city of New Orleans, in the square bounded by Tchoupitoulae, Jersey, Valmont and Leontine streets, designated as lots numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10,

40	142
43	791
40	142
47	309
47	795
47	1475
40	142
48	87
48	901
49	858
49	795
49	1474
49	1475
49	1513

In the Matter of Orloff Lake.

11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25 and 26, and (which) "form and comprise square No. 127. Said square No. 127 measures • • 280 feet 10 inches and 6 lines front on Levee street, same on Jersey street, and 354 feet front on Valmont street, and same on Leon-tine street."

The adjudication thereof was made by the State Tax Collector, under the terms and provisions of act No. 82 of 1884, to enforce the payment of certain unpaid State taxes, due on said property for the years 1869, 1873, 1874, 1875, 1876, 1877 and 1878, as that of Mrs. Helen P. Harrison, or her estate or heirs, as the present owners thereof.

In pursuance of said adjudication the tax collector executed to the said purchaser an absolute and irredeemable title to the said property, with the right to immediate possession thereof, and with full warranty.

This title was duly registered in the conveyance office, and thereunder the adjudicatee applied to the court for a writ of possession.

To this writ of seizure and possession John Leslie made opposition on the following grounds, viz :

1. That said property was acquired in 1853 by the late Mrs. Helen P. Harrison, and that she departed this life on the 4th of July, 1859, leaving as her sole surviving heir her minor child, Daniel C. Harrison, who became of full age in 1874.

2. That said property was inherited by said heir as a part of her estate.

3. That in October, 1885, said Daniel C. Harrison was recognized by the court as the sole heir of his said deceased mother, and, as such placed in possession of all her property, including the property hereinbefore described."

4. That he (opponent) "has lately acquired, through said Daniel G. Harrison, all the rights, title and interest of said D. C. Harrison and of said Mrs. B. S. Harrison (should be Mrs. H. P. Harrison) in and to said property," by notarial act, of date March 29, 1886.

6. That in August, 1885, said property was advertised and sold to Orloff Lake, in the enforcement of certain delinquent taxes enumerated under the provisions of act 82 of 1884.

7. That the advertisement of said property for sale, and said adjudication and sale, were illegal and void, on the following grounds, viz :

a. "Because the property was not assessed for any of said years 1872 to 1878, in the name of said Mrs. H. P. Harrison, or in the name of the estate of Mrs. H. P. Harrison, or in the name of D. C. Harrison,

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the owner thereof, during said years; but the same *was illegally assessed* in the name of John Boylan, who was never the legal owner of said property."

b. "Because said property was *insufficiently and illegally described on the assessment rolls* for said years 1872 to 1878 inclusive; that the description of said property on the assessment rolls for said years was not in accordance with law."

c. "Because, neither said D. C. Harrison nor any person interested in said property ever received any *notice of the assessment* of said property for any of said years, or any notice that any taxes were due on same for said years, or any notice that said property would be advertised or sold to enforce the payment of said taxes, nor did any one interested in said property receive any notice of said sale."

d. Because the State taxes on said property for the year 1873 had been paid previous to said advertisement and sale.

e. Because said advertisement was contrary to the provisions of act 82 of 1884, said property having been advertised as that of "Mrs. H. P. Harrison, or her estate and heirs (as) the present owners."

f. That, if Act 82 of 1884 authorized the tax collector to change the assessment of the property, or to advertise the same otherwise than as it was assessed, it was an unconstitutional law.

g. Because said property was never adjudicated to the State, and was not so advertised, and that same was simply advertised for sale to enforce the payment of delinquent taxes, and said advertisement and sale were contrary to the provisions of act 82 of 1884, as it only provided for the sale of property that had been previously adjudicated to the State.

8. That Act 82 of 1884 is unconstitutional, on the the following grounds, viz. :

aa. Because all the objects of the act are not expressed in the title.

bb. Because the act comprises, deals with and legislates on more than one object.

cc. Because it provides for the divestiture of title to property, "without due process of law,"

dd. Because said act is retrospective in its provisions, and operates as a divestiture of vested rights.

ee. Because said act provides for notice by public citation only, in violation of Article 210 of the Constitution.

ff. Because said act does not provide for, nor allow, the right of redemption, in violation of said Article 210.

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gg. Because said act confers upon tax collectors judicial powers in violation of Articles 14, 15, 80 and 210 of the Constitution.

hh. "Because it is beyond the power of the legislature to provide that an act (of sale) shall be *conclusive* evidence, as provided in said act."

The tax collector's act of sale is annexed to and made a part of the opponent's petition.

To this petition the adjudicatee and petitioner tendered a plea of no cause of action. This was overruled by the judge *a quo*, and on the trial of the merits, he rendered judgment in favor of the opponent, sustained his injunction and annuled the sale to Lake. From this judgment the adjudicatee and petitioner for a writ of possession, has appealed. The correctness of the ruling of the lower judge on the petitioner's exception is the principal question in the case, and we will first examine and dispose of it.

That exception was predicated on the provisions of Section 3 of Act 82 of 1884, which is couched in the following terms, viz.:

"That each tax collector * * * shall, as soon as said adjudications to bidders are made and complied with, execute to each purchaser a deed of sale in the name of the State, of each specific piece of property, before a duly qualified notary public, by authentic act * * * a duly certified copy of which deed shall be *prima facie* evidence of the following facts:

"1st. That the property conveyed was subject to taxation;

"2d. That none of the taxes for which said property was offered was paid;

"And said deed shall be *conclusive* evidence of the following facts:

"1st. That the property was assessed *according to law*;

"2d. That the taxes were levied *according to law*;

"3d. That the property was advertised *according to law*;

"4th. That the property was adjudicated and sold as recited in said deed;

"5th. That all of the prerequisites of the law were complied with, by all the officers, from the assessment up to and including the execution and registry of the deed to said purchaser, etc. * * * If only a portion of the taxes for which the property is sold are proved to have been paid, the sale and title to the purchaser shall, nevertheless, be good and valid the same as if *all* the taxes for which it is sold, had not been paid."

We are to ascertain what is the true and correct import of the

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language employed in this legislative enactment, in so far as same bears on this controversy.

In our opinion we said "that precedents are not wanting to show that in several sister States their legislatures have been recognized as having the power of making such deeds *conclusive* as to *non-essential* prerequisites, but the exercise of legislative power has never been sanctioned, so as to make such deeds *conclusive* as to *essential prerequisites*. * * *

"It would serve no useful purpose to enter into an examination of the prerequisites which are deemed *essential* and *non-essential*, as for the purposes of this case it is amply sufficient to say that all the decisions and commentators agree that the *omission to assess at all* the property to which the deed is made, is a radical, or fatal defect, which strikes the proceedings with nullity."

On this hypothesis we expressed the opinion that the opponent had a right to attack the act of sale in question, and show that the property had never been assessed; and, upon an examination of the evidence adduced in support of opponent's assault upon it, we came to the conclusion that lots 5 and 8 had never been assessed at all.

A re-examination of the record has induced us to modify our opinion in some particulars, but without altering our conclusions with regard to the law.

Reference to the paragraphs we have quoted from the petition of opponent, will disclose that he does not allege that *no assessment* was made at all, but that he does allege that "the property was not assessed in the name of Mrs. H. P. Harrison, etc.;" that same was *illegally assessed in the name of John Boylan*," and that it was "illegally and insufficiently described on the assessment rolls, etc."

The opponent does not allege that the property was not subject to taxation, or that *all* the taxes for which the property was sold had been paid. Of these ingredients the act of sale furnishes *prima facie* evidence, and not being assailed for the want of either, it is full proof of their existence.

This view necessitates an examination of the statute, the constitutionality of which is drawn in question, and a comparison of it with the several charges preferred against the tax title.

It is well settled by the decisions of this Court, as well as those of the courts of our sister States, that the *essential, jurisdictional* prerequisites for the exercise of the taxing power are, viz.:

- 1st. The *listing* and *assessing* of the property.
- 2d. The *levy* of the tax upon it.

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3d. The statutory warrant for its sale.

4th. A sale made under this statutory warrant.

Do we understand that the statute under consideration makes a tax title conclusive as to either? No. What is meant by the phrases: "That the property was assessed *according to law*?" "That the taxes were levied *according to law*?" "That the property was advertised *according to law*?" "That the property was adjudicated and sold *as recited in said deed*?"

Do they not necessarily imply that all those essentials had been fulfilled, and that the tax title is only made *conclusive evidence* that, if performed, they had been performed "according to law?" Does it not follow, as a legal sequence, that, as opponent's complaint is that his property was not assessed *in the name* of the true owner, and was illegally assessed *in the name* of John Boylan, it is excluded by the deed, because it furnishes conclusive evidence of the correctness of the assessment, if made at all? It would seem so.

In *Dorsey vs. Hill*, 4 Ann. 107, plaintiff enjoined an execution on the ground "that the advertisement was illegal, because it was made by a person not authorized to perform the act," and the Court held that the suit put at issue the *capacity* of the officer only.

Bottom vs. Breed, 4 La. 344, an exception was taken to the admissibility of a document in evidence, on the ground "that it did not appear that the sale was made by a *legal officer*;" and the Court held that these reasons ought not to have prevailed against the introduction of this piece of evidence, because the person who executed the process was an officer *de facto*.

As, in each of those cases, the *capacity* of the officer was put at issue, and not the *fact* of an advertisement or sale, so, in the instant case, the opponent has put at issue the legality of an assessment in the name of John Boylan, and not the *fact* of an assessment at all.

Opponent's complaint is not well founded, because it is made of *non-essentials*, which are cured by the execution of the tax title.

With regard to the alleged unconstitutionality of the law, we think opponent is in error. A simple inspection of the title of the act will suffice to show that its object is set forth distinctly, and a perusal of the act will disclose that its *only* object was to enforce the ordinance for the relief of delinquent taxpayers.

We do not regard the provision of the statute, in any sense, retrospective; nor can we perceive in what way they can divest vested rights. The legislature only intended to provide the manner in which

In the Matter of Orloff Lake.

valid sales could be effected of property on which delinquent taxes are due the State prior to the year 1879, and whereby such taxes could be collected.

The ordinance referred to provides that "all interests, penalties, etc., * * on taxes and licenses due the State * * prior to the first day of January, 1879, and yet unpaid, are remitted," etc.

"In the event the principal of said taxes and licenses is not paid by said time, the interest, penalties, etc., * * hereinbefore remitted, shall revive and attach to the property upon which the taxes and licenses are due, and *such property shall then be sold, in the manner to be provided by law, and the title of the purchaser shall be full and complete,*" etc.

In the effort to enforce this ordinance, the legislature passed Act No. 107 of 1880, and, subsequently, Act No. 98 of 1882; but great difficulty was experienced in giving good and sufficient titles to property sold under them, and the State was thereby deprived of this source of revenue to a great extent; hence, the passage of Act No. 82 of 1884 became a necessity. It deals exclusively with the *proceedings* necessary to effectuate sales of such property as are subject to such delinquent taxes, and the execution and effect of tax titles evidencing such sales. It is a remedial law, authorized by the terms of said ordinance. Certainly, the opponent has no vested right in the property that will be divested by the sale made under it, because his vendor, D. C. Harrison, was not placed in possession of his mother's estate *until after it was made*: and the taxes sought to be collected thereby were assessed against her succession and heirs, and he purchased *cum onere*.

That such proceedings as those provided by this act constitute "due process of law," in the sense of the Constitution, has been so often decided, that it may be classed as an elementary principle in matters of taxation.

The provisions of Article 210 of the Constitution of 1879 have *exclusive* reference to the taxes that may be assessed under laws passed in pursuance thereof; and those of the ordinance for the relief of delinquent taxpayers, to delinquent taxes that were assessed in years antecedent to its adoption by the people.

All tax sales made in pursuance of Article 210 are redeemable within one year; but those made in pursuance of said ordinance and law are not redeemable at all.

We do not think the act confers judicial powers on tax collectors.

Bank vs. Tureaud et als.

The objection made to the effect that the legislature was without power to pass a law declaring that a tax title shall be conclusive evidence, as provided in the act under discussion, has been virtually disposed of already, as we have ascertained that it has no reference to essential, jurisdictional prerequisites. We think the law is constitutional, and the exception of no cause of action should have been sustained.

It is, therefore, ordered, adjudged and decreed that our former decree be and the same is annulled and set aside, and that the judgment appealed from be annulled, avoided and reversed; and it is further ordered, adjudged and decreed that the demands of opponent be rejected at his cost in both courts.

No. 10,111.

CITIZEN'S BANK vs. LOUISE TUREAUD ET ALS.

Proceedings for the distribution of funds in the hands of a sheriff and arising from a sale, partake of the nature of a *concurso* and resemble a *tableau* of distribution.

In such cases, particularly when there exists a clash of interests, it is indispensable that all the claims affecting the proceeds in hand be considered together, and determined by one and the same judgment, and not piecemeal or separately.

This is essential, to avoid confusion and injustice.

In the instant case, as two out of several claims have been passed upon separately, and those having an interest to resist them were not made parties, this Court is powerless to review the judgments complained of.

A APPEAL from the Twenty-second District Court, Parish of St. James. *Rost, J.*

H. C. Miller and R. G. Dugué for Plaintiff and Appellee.

Sims & Poché for Defendants and Appellants.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The contentions in this case relate to the distribution of the proceeds of real estate sold to satisfy plaintiff's vendor's claim.

The amount realized, \$6,800, is claimed by a number of opponents who seek preference, the ones over the others, resulting from conventional and judicial mortgages and privileges.

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46 93

It is unnecessary to state in what particulars the demands respectively clash. It is enough to say that they do, and that they aggregate nearly twice the proceeds of sale.

Two only of those claims were considered and determined below. This was done over the objections of one of the opponents. They were tried and passed upon on different days and by separate judgments, which apparently conflict together and seem to have been left for interpretation and enforcement to the discretion of the executive officer of the court.

The remaining oppositions were not tried, and as far as the transcript shows, are still pending.

It has been well observed, that proceedings of this character partake of the nature of a *concurso* and resemble a *tableau* of distribution. *Bowman vs. McKleroy*, 14 Ann. 594.

In successions, in surrenders, and in all kindred matters in which funds are involved for distribution, as the common pledge of creditors, it is indispensable, in order to avoid confusion and injustice, particularly where there exists a clash of interests, that all the pretensions affecting the money in hand be tried together and adjudicated upon by one and the same judgment, which, it is important to all concerned, should not be rendered separately and piecemeal, after different trials.

The first judgment here was upon a rule of the bank against opponent Heath, who had subsequently taken one also. It ordered the payment of the bank's claim, \$3,300, with interest, attorneys' fees, etc., after retaining an amount sufficient to pay Heath, say \$2,200, with interest, attorneys' fees, should he thereafter be decreed entitled thereto.

The second judgment appealed from is on the opposition of Mrs. Gaignard for a priority. That judgment ordered the payment of her claim, some \$3,000, by preference over Heath, or so much thereof as may remain after paying the bank, in case there should not be enough to pay both.

The rules were not tried contradictorily with all the parties who had an interest to resist them and who claimed superiority.

That which the district court could not do, it is not in our power to accomplish.

All the opponents must be heard at one and the same time, before there can be rendered any judgment upon the validity and rank of their respective claims.

When this shall have been done, and the adjudication shall be

State vs. Thomas.

brought up for review, it will become our duty to hear and determine, but not until then.

It is therefore ordered and decreed, that the judgments appealed from be reversed, and that the case be remanded to the lower court, to be proceeded with according to the views herein expressed and according to law; and that appellees pay costs in both courts, from and after the filing of the rules, the other costs to abide the final determination of the suit.

No. 10,089.

THE STATE OF LOUISIANA VS. LANDRY THOMAS.

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107 626

In all criminal prosecutions it is the desire, and to the interest, of the State, that all reasonable facilities be extended to the accused in the preparation of his defense.

Hence, the accused is not responsible for the error committed by the clerk in issuing *subpoenas* to witnesses for the defense, if it appears that the order for such witnesses had been given in a proper manner by the accused or his counsel, and that the witnesses thus ordered are residents of the parish.

A party accused, who discovers on the day fixed for his trial that a material and important witness, ordered by him, and by whom alone he could establish a fact important or indispensable to his defense, had not been summoned, because the given name of the witness had been by error of the clerk changed into another name, in making out the summons, is legally entitled to a continuance on proper showing, for the purpose of procuring the attendance of such witness.

For making the discovery on the day of trial only, he can not be charged with want of due diligence.

A PPEAL from the Thirteenth District Court, Parish of St. Landry.
Estillette, J.

M. J. Cunningham, Attorney General, and *John M. Ogden*, District Attorney, for the State, Appellee :

1. Where an application for a continuance in a criminal case, based upon the absence of a material witness, is refused because of the lack of due diligence on the part of the defense in securing the attendance of such witness, on appeal the record should contain affirmative proof of the exercise of due diligence or the judgment of the Court *a qua* will be affirmed. *Knobloch's Cr. Di.* p. 122, "Diligence."
2. A juror living in a parish other than the one in which the accused is tried is incompetent. 30 Ann. 335.
3. And the Court may *ex proprio motu* upon discovering the fact, discharge the incompetent juror before the introduction of any evidence in the case. *State vs. Diskin*. 34 Ann. 920, and authorities therein cited.
4. The question as to whether the confessions of an accused are voluntary or not is for the trial judge to determine. If the evidence upon which he rules in favor of the voluntary character of the confessions is not incorporated in a bill of exceptions the Supreme Court cannot test the correctness of such ruling and it will be sustained. 34 Ann. 147.
5. Parol evidence is admissible to prove a confession made in open court presided over by

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a magistrate when such confession was not taken down in writing. State vs. Simien, 30 Ann. 297.

6. The fact that the confession was in the nature of a plea to a charge contained in the affidavit against the prisoner, the substance of which charge was undisputed, does not make it necessary to produce the affidavit and exclude parol testimony of the confession. The contents of the affidavit was not at issue. It was simply an incident to the main fact to be proved.
7. Where the ruling of the trial judge causes no injury to the accused he will not be granted a new trial. Knobloch's Cr. Di. p. 339.
8. Leading questions may be put to an exceedingly unwilling witness. Wharton's Cr. Ev. § 454 a.; 26 Ann. 75; Proffat on Jury Trials, § 227.
9. On an indictment for "rape" there can be no verdict for "assault and battery," and the trial judge rightfully refuses to charge that there may.
10. Errors in the judge's charge to the jury should be brought up for review to the Supreme Court by bills of exception, and not in an assignment of errors. 35 Ann. 774; 37 Ann. 51, 1; 35 Ann. 543, 619, 970; 38 Ann. 497.

E. P. Veazie and *C. W. DuRoy* for Defendant and Appellant.

The opinion of the Court was delivered by

POCHÉ, J. The defendant appeals from a sentence of death under a conviction of rape, and charges numerous errors to his detriment.

His first complaint is levelled at the judge's refusal of a continuance which he had asked under the following circumstances: When brought up for trial, on the 28th of October, 1887, the accused filed a motion for continuance on the ground of the absence of a material and important witness, residing in the parish, who had not been summoned although his name had been written, with an order for a *subpana*, in the proper book by defendant's counsel on the 24th of October, four days previous to the day of trial.

The judge's refusal was grounded on want of proper diligence on the part of the accused to secure the attendance of the witness.

It appears from the record, and from the original order for *subpana* to witnesses, as written by counsel, and which is attached to his bill of exception, that in writing down the name of that witness, which is "Archie Sanders," counsel connected the letters in such a manner that a first glance the given name looked like "Archie," and hence the summons was addressed by the clerk to "Ardie Sanders," and the sheriff returned that the person thus named could not be found. In reading the name as written in the original order we find no difficulty to make out the name of "Archie Sanders" as that of the person intended by the writer of the order.

The question presented is therefore to determine whether the accused can be held responsible for the error of the clerk in summoning

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the wrong person, or in making out a summons addressed to so strange and unusual a name as *Ardrie* as a given name, especially when coupled with the cognomen of "Sanders."

To the suggestion of the district judge that under ordinary diligence it was incumbent on the defendant to have discovered the error, and to have had the same corrected in time for the trial, "as the return of the sheriff was made some time before the case was called for trial," an easy answer is that the accused should not be made to suffer for an error of the clerk, whose plain duty was to call on counsel for the accused to remove the doubt which he might have entertained as to the precise name intended to have been written by the attorney.

We do not understand the discussion to involve the question of due diligence at all; but merely and exclusively to deal with the consequence of a palpable error committed by an officer over whom the accused or his counsel had no control, and for whose error the injured party can surely not be held responsible.

But should the question of due or ordinary diligence be considered as the pivotal point of the contention, the record does not warrant the conclusion that the accused is guilty of any laches on that score. In his statement that the sheriff's return had been made "some time before the case was called for trial," the judge does not inform us of the precise length of time which intervened between the return and the trial; whether the return was made on the same day or the day before. As the order had been given on the 24th, and the trial took place on the 28th of October, it is clear that the "sometime" referred to by the judge could not have meant several days; and the doubt resulting from the expression above quoted cannot be construed against the accused. Hence, it does not appear that the question of due diligence could be decided adversely to the motion.

Now it appears that the indictment had been presented on the 21st of October, the case was fixed for trial on the 28th of the same month, the *subpoenas* for witnesses were ordered on the 24th, and the continuance asked by the accused was only to the 31st of the same month, at which time a jury would have been in attendance. Was there anything extraordinary or unreasonable in the delay prayed for, or does the relief asked suggest anything to justify the conclusion of the trial judge that the sole object of the motion was delay? We think not.

In his motion, supported by affidavit, the accused states that by the testimony of Archie Sanders he could prove a very material fact, which, if established, would necessarily have changed the verdict, and

State vs. Thomas.

that he could not prove that fact by any other witness. 8 Mo. 606, Freleigh vs. State.

The fact is detailed with precision in the motion, but we deem it best not to reproduce it in this opinion.

Now, through the error of a ministerial officer who failed to read, or to copy correctly, a plainly written name, the accused has been deprived of the benefit of most important testimony. It may be that the witness, if present, would not have testified as represented by the accused. But this supposition cannot impair his legal right to secure his attendance and to produce his testimony.

If the witness, when produced, should entirely fail to establish the fact relied on, that circumstance will strengthen the case of the State; will remove the last doubt as to the guilt of the accused, and the correct administration of justice will to that extent be enhanced.

In a criminal prosecution the State is not zealous for conviction; her only aim is justice, which will not condemn without a fair and impartial hearing. Hence the State herself tenders her whole power to the accused in his effort to prove his innocence, and her desire as well as her interest require that all facilities be given to the accused to produce all the testimony which the nature of his case may admit of or require.

Counsel for the defendant, after giving his order for witnesses in manner and form required by law and by the rules of the Court, together with the written information of the place where the witnesses resided, as shown to have been done in this case, and within a reasonable time before the day fixed for the trial, knowing that the witnesses to be summoned were residents of and were present in the parish, had every reason and every right in law to presume that the summons would be issued as ordered, and served in time for the trial. Hence his client cannot suffer for the laches or errors of others.

As we are thoroughly convinced that through inadvertence of the trial judge, the defendant has been denied a right to which he was legally entitled, we are constrained to overcome our repugnance to interfere in such cases with rulings of district courts, and to set aside the conviction of this defendant. State vs. Egan, 37 Ann. 371; State vs. Bolds, 37 Ann. 310; State vs. Briggs, 34 Ann. 71; State vs. Boitreaux, 31 Ann. 189.

Under these views the discussion of the other complaints urged by his counsel is entirely obviated.

It is therefore ordered, adjudged and decreed that the verdict of the jury be set aside and the judgment appealed from annulled, avoided and reversed, and it is ordered that this case be remanded for further proceedings according to law.

Mineral Water Manufacturing Company vs. Deblieux and Letorey.

No. 10,043.

**CRESCENT CITY SELTZ AND MINERAL WATER MANUFACTURING
COMPANY VS. EDWIN DEBLIEUX AND VICTOR LETOREY.**

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114	325
40	155
117	307
40	155
125	147

The action against defendant, Letorey, is not sustained by the evidence, so far as it charges simulation, and, as a revocatory action, is barred by the prescription of one year.

A pledge of shares of stock in corporations is validly effected by the delivery of the certificates, without the necessity of notice to the corporation or transfer on its books.

The case is not affected by the fact that the certificates refer to the charter, which contains a provision that no sale or transfer shall be made without first giving the corporation sixty days' notice, with the privilege to it or its members to purchase on equal terms.

Such provision obviously refers to transfers of ownership, and not to pledges. It will be time enough to discuss its effect and the rights of the corporation under it, when the pledgee shall seek to sell the stock in satisfaction of his pledge.

A PPEAL from the Civil District Court, Parish of Orleans.
Houston, J.

S. Belden, for Plaintiff and Appellee.

White & Saunders, for Defendant and Appellant.

The opinion of the Court was delivered by

FENNER, J. The plaintiff took out a writ of attachment against its debtor, Deblieux, under which it seized, in the hands of Henry Tremoulet, a certain share of its own stock which was owned by him. Tremoulet refused to deliver the stock certificate to the sheriff. Thereupon plaintiff filed a supplemental petition, making Tremoulet a party, in which it was alleged that the latter was holding said stock as a confederate of Deblieux in an attempt to defraud his creditors, and had thereby made himself liable for the debts, and praying judgment against both. Tremoulet answered that he held said stock as agent of Victor Letorey, to whom it had been validly pledged for a debt of seven thousand dollars.

Plaintiff then dismissed its suit against Tremoulet and filed another petition, to which it made Letorey a party, in which, under appropriate allegations of fraud and simulation, it prayed for judgment decreeing Letorey's pledge to be fraudulent and null and without effect upon plaintiff's rights under the attachment. Letorey answered, asserting the validity and good faith of his debt and pledge.

On these issues the case went to trial. The judge *quo* does not find that either the debt or pledge of Letorey was simulated or fraudulent. Indeed, the evidence abundantly establishes that the pledge was a reality and made to secure a *bona fide* debt, and that, even if it had been made in fraud of creditors, the revocatory action

Mineral Water Manufacturing Company vs. Deblieux and Letorey.

was clearly barred by the prescription of one year, which was duly pleaded.

But the judge avoided Letorey's pledge on the ground that notice thereof had not been given to the corporation, and subjected the stock to plaintiff's attachment.

It is now perfectly settled that shares of stock in corporations may be validly pledged by delivery of the stock certificates without the necessity of notice to the corporation or transfer on its books. Pitot vs. Johnson, 33 Ann. 1286; Factors vs. Marine, 31 Ann. 149; Friedlander vs. Slaughterhouse, *id.* 523; Smith vs. Slaughterhouse, 30 Ann. 1378.

The judge, however, held that these authorities did not apply to the instant case, because the certificate recited that the stock is "transferable only on the books of the corporation in accordance with its charter," and because the charter contains the following provision :

"*Transfers of stock shall be made only on the books of this corporation, at its office, and no sale or transfer shall be made by the owners, nor be valid until sixty days' notice of the intention to transfer or sell said stock shall have been given to the president of the corporation, and unless, also, this corporation, or in default thereof, any one or more members of said corporation, shall have had the privilege of purchasing said share or shares of capital stock at the bona fide price offered therefor outside of this corporation, or in default of any such offer, at the market value of such share or shares.*"

It is obvious that this provision refers only to transfers of ownership, and not to pledges, its object being to prevent the disposition of the stock to strangers without first giving the corporation or its members the opportunity of purchasing at an equal price.

When Letorey shall seek to enforce his pledge by sale and transfer of the stock, it will be time enough to discuss the effect of this provision and the corporation's rights thereunder to claim said notice and privilege.

For the present Deblieux remains the owner and Letorey's rights as pledgee, being fully established, must be maintained.

It is, therefore, ordered and adjudged that the judgment appealed from, in so far as it affects Victor Letorey, be annulled and set aside, and that there be judgment rejecting the demand of plaintiff as against said Letorey, and maintaining the validity and effect of the latter's pledge of the share of stock attached herein, plaintiff to pay the costs of this appeal.

McKenzie et al. vs. Bacon et als.

No. 10,046.

AMELIA C. MCKENZIE, ET AL., VS. GABRIELLA BACON, ET ALS.

An authentic act of sale is full proof against all parties thereto. In the absence of a charge of fraud or error, it cannot be contradicted by parol proof tending to show that the sale was not real, that the ostensible purchaser was but a person interposed, and that he had incurred no obligation to pay the price.

Parol evidence cannot be received to create or destroy a title to immovable property, or to prove an agency to buy or sell such property.

Where immovable property of an interdict (a lunatic) has been sold under regular proceedings, preceded by a valid order of a competent court, and the *proces verbal* shows an observance of the required formalities, and a valid adjudication for an adequate consideration, parol evidence is inadmissible to prove that the proceedings and adjudication were not intended to convey the property to the adjudicatee, but that he was merely interposed to hold the naked title, in order that he might convey it to another.

A curator of an interdicted person cannot keep the funds of the interdict without accounting for the same to the probate court, under a claim that the interdict is indebted to him. He must account for the money received, and the indebtedness of the interdict, if it exist, must be settled and adjudicated under the supervision of the court. Nor can such curator transfer his claim to another person and authorize such person to collect the money of the interdict and retain it in satisfaction of the debt so transferred, without proper judicial sanction.

The failure of the adjudicatee, at a judicial sale, to pay the price, gives the vendor the right to demand the revocation of the sale, though the property may have passed from the possession of the adjudicatee.

Where a person dies leaving no descendants or ascendants, but a brother and children of a pre-deceased brother, the latter are called to the succession of their uncle by representation, the children representing their pre-deceased father: but though thus representing their father, they do not derive their right to inherit from him, but from the law. Such right is not impaired or affected by any act of their father. Therefore, they are not estopped from prosecuting a right of action derived from the succession of their uncle, on account of acts or omissions of their father, although these acts or omissions might have estopped him (the father) had he survived the intestate from maintaining the action. Reaffirming 4 N. S. 557; 23 Ann. 290; 33 Ann. 1001.

A PPEAL from the First District Court for the Parish of Caddo.
Taylor, J.

Young & Thatcher, for Plaintiffs and Appellants:

"The right to rescind a sale for non-payment of the price is absolute on plaintiffs tendering the notes and amounts received, and his rights may be transferred to the heirs." *Castle vs. Floyd*, 38 Ann. 583.

Registry is not necessary to preserve this right. *Johnson vs. Bloodworth*, 12 Ann. 701. The right to dissolve the sale for non-payment of the price is independent of the mortgage. 28 Ann. 598.

An administrator cannot pay debts or legacies, even where there are sufficient funds, without being authorized by the judge to that effect. C. C. 1063.

The fathers of minors cannot, in purchasing, retain the price, because entitled to receive the legacy for them and to enjoy the usufruct thereof during marriage.

His debt to the estate is personal and his claim to the legacy in *autre droit*. *Gorton vs. Gorton*, 12 La. 466.

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40	157
107	442
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116	966
40	157
118	465

 McKenzie et al. vs. Bacon et als.

The relation between factor and principal is not that between debtor and creditor. It is a relation of trust and confidence and compensation does not take place. O. C. C. 2207; Nolan vs. Shaw, 6 Ann. 46.

Accounts between principal and factor are necessarily provisional until settled, and even after settlement may be rectified by either party on account of error or omissions. Bloodworth vs. Jacobs, 2 Ann. 25.

Every curator of vacant successions, as of absent heirs, is prohibited from purchasing by himself, or by means of a third person, any property, movable or immovable, intrusted to his administration under pain of nullity. C. C. 1146; Michaud vs. Girod, 4 Howard, 503. A person interdicted is like the minor. C. C. 415.

Where the court has ordered the sale of property on terms of credit, and it was sold for cash, the sale will be void for want of an order of sale. 15 Ann. 254.

Minors and persons interdicted cannot be prescribed against except in cases provided by law. C. C. 3522.

Judgments of courts charged with the administration of minors or interdicted persons—Probate Courts—cannot be contested in any other courts in collateral proceedings. 2 Ann. 642; 6 Wallace, 703; 1 H. D. p. 763, No. 2.

They are certainly conclusive unless shown to be erroneous. 1 H. D. p. 588, No. 3.

"A trustee shall not be permitted to mix up his own affairs with those of the *cestui que trust*." Wormley vs. Wormley, 8 Wheaton, 463; *ib.* 444.

A trustee is not an agent. Taylor vs. Davis, 110 U. S. 330, and authorities there cited.

Those dealing with notice of facts are necessarily affected with notice of the law operating on those facts. Wormley vs. Wormley, 8 Wheaton, 445; Boone vs. Child, 10 Pet. 210-11-12; Vatin vs. Hinde, 7 Pet. 271-2.

PREScription.

Prescription of notes does not bar action to dissolve. 24 Ann. 537; 11 Ann. 655; 1 Ann. 442; 16 Ann. 129.

Nor even omission to register, but in this case there was registry. 32 Ann. 461.

Prescription of action to dissolve does not run against lunatics originally interdicted, when, as in this case, they had no guardian or curator, indeed, the exception is not qualified. C. C. 3522, 3554; 2 Ann. 316, 320; 13 Ann. 340; 6 Ann. 111; 1 Ann. 442; 16 Ann. 130; C. C. 415.

Henry C. Miller and F. L. Richardson, and W. A. Hunter, on same side.

Wise & Herndon and Alexander & Blanchard, for Defendants and Appellees:

1. "Neither the heirs of a deceased person, nor the transferee, can sue for the resolution of a sale until previous tender has been made of the outstanding purchase notes, and such part of the purchase price as may have been paid by the purchaser." 38 Ann. 583, and authorities therein cited. "A tender is a condition precedent *sine qua non*, to authorize a suit to rescind a judicial sale." Farquhar vs. Hies, 39 Ann. not yet reported.
2. "The real cause or consideration of a written contract involving the transfer of immovable property may be shown by parol evidence." 32 Ann. 432; 3 Ann. 230; 36 Ann. 565. "Parol evidence is admissible to prove what occurred at the time of a judicial sale, or subsequently, in relation to compliance with terms of the sale." 1 R. 413. "So, too, that the price of real estate sold at auction was paid to a mortgagee, and the mode of such payment." 11 R. 270.
3. This is an action to rescind a sale for non-payment of the price. The proof shows that every dollar of the purchase price was paid, not directly by the nominal purchaser, Donaldson, but by White for him. It can make no difference, in fact or in law, to the

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interdict or his heirs, whether the payment of the price was made directly by Donaldson or mediately through White.

4. The heirs of Dr. M. L. Gilmer, guardian, are bound by his acts, whether of fraud, negligence or omission, and having by the averments of their petition accepted his succession, are estopped from contesting the title of defendants. 14 Ann. 642; 15 Ann. 140. Francis M. Gilmer, another plaintiff, the proof shows, and he himself admits, had full knowledge of and advised the making of the sale to White in the manner in which it was done, and also discounted one of the notes given by White as part of the purchase price. He is clearly estopped from taking advantage of any defects or irregularities in the matter.
5. This suit was not brought until thirteen years after the sale was made; after the property had passed into the hands of third parties, innocent purchasers, and after the death of almost all of the parties connected with the sale. It is a stale demand, one upon which the courts look with extreme disfavor, and in order to establish which it is not enough for the plaintiffs to render probable, but they must make certain 7 Ann. 555, 559; 14 Ann. 317; 35 Ann. 1005; 37 Ann. 95.

PLEA OF WANT OF TENDER.

"Neither the heirs of a deceased person nor the transferee can sue for the resolution of a sale until previous tender has been made of the outstanding purchase notes, and such part of the purchase price as may have been paid by the purchaser." 38 Ann. 583, and authorities cited.

"A real tender is a condition precedent *sine qua non*, to authorize a suit to rescind a judicial sale. Article 417, C. !., touching tenders made at any stage, refers to such as are made by a defendant. When it is alleged, denied and not proved by plaintiff, the action must be dismissed." Farquhar vs. H. S. Iles, et al., 39 Ann. (decided at Opelousas, not yet reported).

The plea is good, but defendants, who now own the property, are anxious to have the cloud on their title removed, and hence do not urge its consideration upon the court.

The opinion of the Court was delivered by

TODD, J. This is a suit by the heirs of Nicholas M. Gilmer to rescind the judicial sale of a plantation situated in the parish of Caddo, and known as the "Nick Gilmer Plantation," for the non-payment of the price.

The suit is against the heirs of Prassley W. Donaldson, the adjudicatee as purchaser at said sale, and those holding under him by mesne conveyances.

The plantation named belonged to Nicholas M. Gilmer, a resident of Alabama, and at the time of the sale, and long prior thereto, an interdicted lunatic, under the guardianship of Merriweather L. Gilmer, a resident also of Alabama.

The order for the sale of the property was made by the parish judge of Caddo parish, on the 19th of April, 1871, by the recommendation of a family meeting previously convoked for the purpose of advising in regard to said sale; and after the regular delays and advertisements, the sale was made at public auction on the 23d of May, 1871, and the

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property was adjudicated to P. W. Donaldson for \$32,000, \$5000 cash, and the balance on a credit payable in equal installments of one and two years, and secured by special mortgage; and on the 14th of June following a formal conveyance was passed before a notary conforming to the terms of the adjudication. This conveyance was duly recorded, and the inscription of the mortgage and vendor's privilege remained until the 8th of February, 1878, when it was canceled, by what authority it does not appear.

Nott & Leonard, attorneys for the guardian, received from the auctioneer the cash paid at the sale, and the notes of Donaldson for the credit part of the price and sent the same to the curator as guardian of the interdicted Donaldson himself, and took his (Donaldson's) receipt for the same.

M. L. Gilmer, the guardian, died in 1873, and the interdict in 1883, and in 1884 this suit was filed.

In December, 1871, Donaldson sold the property to Reuben White for \$32,000, \$20,000 paid in cash and the balance on a credit of one and two years.

Donaldson never paid over to Gilmer, guardian of the interdict, the cash put in of the price of adjudication, and never paid or even delivered to him the notes he had executed for the credit portion of the price.

The notes were found after the death of Donaldson among his effects, with his name torn off and unindorsed by him.

The defense to the action presented in the answers is substantially as follows :

It is charged that the sale to Donaldson was not a real sale, that he was but a person interposed for the purpose of making, subsequently, to White, a conveyance of the property under a private agreement previously had with the guardian of the interdict. That White and another person were to buy the property jointly at the public sale, but that this other having failed to meet the engagement with White, it was agreed that Donaldson should have the property adjudicated to him at the judicial sale, and make the conveyance to White afterwards; and in the meanwhile Donaldson was to hold the naked title in his name until such time as White was ready or prepared to comply with the terms of the sale. It is urged that White was the real purchaser of the property, and that he paid to Donaldson, alleged to be the agent of the curator or guardian of the interdict, the entire price for the property, and that, the price being thus paid, an action of remission for its non-payment must fail.

There were filed also pleas of estoppel, want of tender and prescription.

The plaintiffs are appellants from a judgment rejecting their demand.

The first legal question we are confronted with is a question of the admissibility of evidence. On the trial below, the court admitted against the objection of the plaintiffs, parol testimony in support of the defenses set up in the answer, as above-detailed, to-wit:

That the judicial sale to Donaldson was not real; that Donaldson was a mere party interposed, and that White was the real purchaser; also, of the private agreement under which the arrangement touching the judicial sale to Donaldson and the conveyance from him to White was to be consummated or carried out.

The objections, substantially, to this evidence, as shown in the bill of exceptions, were:

That the testimony was an attempt—

1st. To destroy title to real estate under a judicial sale by parol.

2d. To establish title in some other person than shown by the adjudication and notarial act, by the same character of evidence.

3d. That it was an attempt to prove by parol an agency to buy and sell real estate.

4th. To prove by parol, agreements relating to real estate antecedent and subsequent to the execution of the authentic act of sale from the estate of the interdict to Donaldson.

5th. That it was an attempt to prove by parol, matters and things beyond what was contained in the authentic act.

As stated, these objections were all overruled and the testimony admitted.

An examination of the record shows conclusively that all the proceedings relating to this sale were legal and regular—including the recommendation of the family meeting advising the sale, and fixing the terms thereof—the homologation of the proceedings and the order of sale, the adjudication, and everything else relating to the confection or completion of the sale. The record in these respects is perfect and complete.

There is no pretense or allegation of fraud or error connected with these proceedings, but the proposition in substance is, in the absence of all cause of nullity in the proceedings, to destroy this complete and perfect record and establish another sale by parol. That is, to show that there was no judicial sale; that Donaldson, the declared adjudicatee, did not in fact purchase, but that he was merely interposed for

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some one else; that he did not pay the cash which the *proces verbal* declares he did pay, and never obligated himself to pay the credit portion of the price, but that the notes given by him were but a pretense and empty formality.

We cannot escape the conclusion that the attempt to contradict these essential, vital and solemn declarations of the *proces verbal* of the adjudication and the stipulations of the notarial act confirming the same, was in direct contravention of the rule laid down in Article 2276 C. C., as follows:

"Neither shall parol evidence be admitted against or beyond what is contained in the act, or what may have been said before or at the time of making them, or since."

And also of the provisions of Article 2236 of the Code, which reads:

"The authentic act is full proof of the agreement contained in it against the contracting parties, and their heirs or assigns."

Further, it is expressly provided that a power of attorney conferring authority to contract with reference to real estate must be in writing. C. C. 2992; *Moggatt vs. Greig*, 2 L. 596; *Baden vs. Baden*, 4 L. 167.

This last reference applies to the proposition to prove by parol that Donaldson was authorized by the guardian of the interdict to make the arrangements and agreement respecting the disposition of the land, including the sale to White mentioned in the foregoing statement of facts.

The articles which control our conclusions on this point seem so clear as to require no reference to adjudications to strengthen them, if confirmation is sought; but out of a multitude of decisions we refer to a number which bear a strong analogy to the instant case: *Baden vs. Baden*, 4 L. 167; *Liantano vs. Baptiste*, 3 R. 432; *Fuselier vs. Fuselier*, 5 Ann. 132; *Barbin vs. Gaspard*, 15 Ann. 539; *Smith vs. Lambert*, Ib. 566; *D'Aquin vs. Barbour*, 4 Ann. 441; *Kunmenseugeiser vs. Juncker*, 28 Ann. 678; *Hackenberg vs. Gastzkamp*, 30 Ann. 898.

It has been expressly held that "where real property is adjudicated at public sale to one, to whom the title is made, his agency in the purchase for the benefit of his co-heirs cannot be proved by parol." 5 Ann. 132; 12 Ann. 213; Ib. 878.

To make correctness of our views even plainer, if possible: Suppose, for instance, that after this judicial sale to Donaldson, the interdict had recovered his reason, and ignoring the sale made during his interdiction had sought to recover the property.

The proceeding relating to said sale being, as before stated¹, entirely

legal and regular, of course he would be bound by the sale and estopped thereby from a recovery.

Suppose, on the other hand, that he should have brought suit against White for the price of the property, in the averments that he, Gilmer, was the real vendor of the property and that White was the purchaser from him and not from Donaldson—the latter being a mere person interposed, and that White and not Donaldson was his debtor—it is evident that, in the absence of fraud or error charged, and with no transfer to himself of the evidences of the debt, White, upon objecting to the competency of parol evidence to prove these averments, could have defeated his recovery.

Rejecting the parol evidence to contradict the record as to this sale to Donaldson, and guided alone by this record, the case stands thus:

We find a perfect sale of the property from the estate of the interdict to Donaldson by judicial process.

Further, that about six months after the purchase by Donaldson, a sale by him of the same property to White.

And, as a further fact having an important bearing on the controversy, that the mortgage retained to secure the price from Donaldson was duly recorded and was of record when White bought and when those holding under him acquired the property.

This is all that the record discloses—at least by written evidence.

Finally, it is also shown by competent evidence that Donaldson never paid to the interdict, or his guardian, the notes given by him for the price of the property.

White, however, paid Donaldson in full the price for which he purchased the property from him, but no part of the sums he thus received from White did Donaldson pay over, at least in money, to the interdict or his guardian. It is, however, urged and attempted to be shown, that the price paid by White to Donaldson for the plantation was virtually paid to the interdict, or enured to his benefit in this way.

It was averred that the interdict was indebted to his guardian and was proved on the trial that the guardian transferred this claim against the interdict to Donaldson, and that he (Donaldson) applied the money received from White for the property to the extinguishment of this indebtedness of the interdict to Gilmer, guardian, or himself (Donaldson) as transferee.

We cannot concede that M. L. Gilmer, guardian, could himself receive the price of land coming to his ward and dispose of it by applying it to the extinguishment of his debt against his ward extra-judicially; but it seems to us that when the money was thus received, it

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was a matter for settlement before the probate court of Alabama. The funds of the interdict, when they came into the hands of his guardian, were essentially trust funds, and were to be accounted for to the court, and settled and adjusted by proper proceedings before the court; and the guardian, if he could transfer his claim against the interdict to another person, and could authorize such person to receive or collect funds belonging to the interdict, could only do so under the restrictions and conditions to which he himself was legally subject.

Be this, however, as it may, the record does not satisfy us that the interdict was indebted to his guardian. It is true that from the proceedings before the probate court of Alabama, in the matter of this interdiction and guardianship, it does appear that a provisional account was filed and homologated, by which a balance appears against the interdict, in favor of the guardian, of \$18,409 85. This was of date June 25, 1866.

It further appears, however, that after the death of Gilmer, guardian, proceedings for an accounting were taken against his legal representatives by the heirs of the interdict. An account was filed, and judgment rendered against the guardian's estate for \$27,509. This judgment was rendered on the 30th of May, 1887, and is a final judgment, conclusive of all matters pertaining to the guardianship.

This judgment is bitterly assailed. It is charged with having been procured by consent or connivance. The record shows that it was regularly rendered and properly certified, and that it was not appealed from nor annulled. We do not feel authorized, therefore, to disregard it, but on the contrary are bound to give it effect.

This ground of resistance to the plaintiff's action must, therefore, fail; and it is the very foundation of the defense.

There was a plea of want of tender; but the counsel of defendants in their brief expressly decline to urge it.

There is likewise a plea of estoppel.

The defendants charge that M. L. Gilmer, guardian of the interdict, consented to the agreement or understanding by which Donaldson was interposed as the nominal purchaser at the judicial sale, and to the subsequent sale of the property by him to White; and that his children, who are among the plaintiffs in this suit, are bound by his acts and are estopped from objecting to or attacking the proceeding covered by this agreement.

It is unnecessary for us to determine whether in fact M. L. Gilmer, the guardian, consented to said agreement, or was guilty or not of any

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unauthorized or illegal act of commission or omission respecting said proceeding.

It is shown that said Gilmer, guardian, died before the interdict, and his children inherited the property in controversy, or their rights thereto, not from him, but from the interdict directly. The interdict was living at the time of M. L. Gilmer's death, and therefore Gilmer was not his heir and could have had no interest in his estate. *Nemo est hæres viventis*

It is true that his children inherited from the interdict by what the law terms representation, but none the less did they inherit directly from him and in their own right. They were bound by no acts of their father, whom they represented, nor by obligations of his (if any) resulting from said acts as guardian or otherwise.

In the language of the Code: "Representation is a fiction of the law, the effect of which is to put the representative in the place, degree and rights of the person represented." C. C. 894.

Mourlon, after quoting the corresponding article of the Code Napoleon, proceeds to comment as follows:

"Il n'est pas exact de dire que le représentant entre *dans les droits du représenté*. On ne représente, en effet, que ceux qui sont morts *avant le de cujus*; or, aux termes de l'art. 725, les personnes qui avaient cessé d'exister au décès du *de cujus* n'ont aucun droit à sa succession; en cessant de vivre, elles ont cessé d'être capable. Le représenté n'a donc eu aucun droit, à la succession du *de cujus*."

And again:

"Au reste il n'est pas nécessaire d'être héritier d'une personne pour la représenter, il suffit d'être son descendant. Mon père meurt et je renonce à sa succession; je le représenterai néanmoins dans la succession de mon aïeul paternel, lorsqu'elle sera ouverte. Cela se conçoit, le droit de représentation ne faisait point partie de la succession de mon père; ce n'est pas de lui que je le tiens, je le tiens de la loi. C'est un droit qui est né dans ma personne; dès lors peu importe que je sois ou non l'héritier de mon père. Je suis toujours son descendant, et c'est en cette qualité que j'ai le droit de le représenter. De là la règle qu'on peut représenter celui à la succession duquel on a renoncé. Mourlon, Examen du Code, 2 vol, p. 41, et seq.

Toullier on the same subject says:

"Il faut donc poser en principe que les enfans qui succèdent avec des parens plus proches du défunt, comme aurait fait leur père, ne tiennent point ce droit de celui-ci, et ne représentent point sa personne. C'est un droit qui leur est propre et qu'ils ne tiennent que de la

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loi." * * * Barthole avait dit: "*Quod filius succedat in locum patris seu matris, quantum ad successionem avi, non habet a patre, sed ex dispositione legis.*" Toullier, vol. 2, p. 111.

These views are supported by many other eminent French jurists. Paillet, leg and juris, des Suc. 2, 600 Manuel de droit Français, art. 744, note Laurent, 2 vol. p. 138, No. 175; on art. 848 (Court elem de dr. Civ.)

The same principle is substantially embodied in our own Code Thus art. 900 C. C. reads:

"One who has renounced the succession of another may still enjoy the right of representation with respect to that other."

And this principle has been substantially recognized by the decisions of this Court. Destréhan case 4, N. S. 557; Suc. of Misses Morgan, 23 Ann. 290; Calhoun vs. Cosgrove, 33 Ann. 1001.

There is, therefore, no force in the plea of estoppel as respect the descendants of M. L. Gilmer.

The principle that excludes them from the operation of such plea does not, however, exist in favor of Francis M. Gilmer, another of the plaintiffs. He was a brother of the interdict, inheriting immediately from him; and there is no question of representation to him involved.

It is shown beyond a doubt that he was for many years the adviser of M. L. Gilmer, guardian. He also was fully cognizant of the entire proceeding relating to the judicial sale and subsequent disposition of the property. He agreed to the arrangement and consulted with Donaldson, who was his son-in-law, the agent of M. L. Gilmer, and the adjudicatee of the property, and with the attorneys employed to effect the sale. He was fully committed to the plan of operations adopted with respect to the alienation of the property. Moreover, after the sale was made by Donaldson to White, he ratified it so far as relates to himself, by discounting one of the notes executed by White for part of the price, and received the payment of it. How could he consistently receive part of the price of this sale to White, knowing as he did all the facts relating to it and that led to it, and afterwards seek to recover the land itself? It does not lie in his mouth now to say that this sale to White was illegal and void, and that the sale should be rescinded for non-payment of the price when he had received a part of the price himself.

He is estopped under the equitable principles of the law from doing so.

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The plea of prescription is not urged or discussed before this Court, and it might be considered as abandoned.

But however that may be, prescription was suspended as to the interdiction during his life, and this action was instituted by his heirs in a year after his death, and the plea is therefore without force.

This completes the review of the facts relating to this case, and of the legal questions and issues pertaining to the controversy, and from the conclusions announced, it is manifest the Court *a qua* was in error in dismissing the action.

There were questions raised by the pleadings touching the rents and revenues of the property, and the value of the improvements and reimbursement therefor.

From the disposition of the case by the lower court, of course these questions were not considered. They will be left for future determination, and this will necessitate the remanding of the case.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be annulled, avoided and reversed, and proceeding to render such judgment as should have been rendered, it is further ordered, adjudged and decreed that the suit so far as relates to Francis M. Gilmer, one of the plaintiffs, be dismissed and his demand rejected; and it is further ordered, adjudged and decreed that there be judgment in favor of the other plaintiffs in the suit, and that the judicial sale of the property described in the pleadings and attacked in this suit be rescinded and annulled to the extent of four-fifths interest therein, and that the said undivided interests of said land be restored to the plaintiffs (excluding said Francis M. Gilmer), to be held and owned by them according to and in proportion to their respective heritable rights therein. It is further ordered, adjudged and decreed that the case be remanded to the lower court for the sole purpose of determining the respective demands of the parties touching the rents and revenues of the property and the reimbursement for improvements made thereon since the sale aforesaid now rescinded.

The costs of both courts to be paid by the defendants.

Poché, J., being absent when this case was tried, takes no part in the decision.

Justice Watkins recuses himself, having been of counsel.

ON APPLICATION FOR A REHEARING.

BERMUDEZ, C. J. The Court did not decree the return of the five thousand dollars paid at the judicial sale, for the reason that it consid-

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ered that a decision on that subject had been waived and that one was desired on the merits of the case.

As complaint is now made on the subject and adverse parties have, in an answer to the petition for a rehearing, consented to relief being allowed, the matter can be easily settled, without granting a rehearing.

It is therefore ordered that the previous decree herein rendered be amended so as to allow defendants credit in the adjustment accounts for four-fifths, to-wit: Four thousand dollars (\$4000) of the amount, with legal interest from the acquisition of the property from the present owners thereof, the said sum to be credited on the rents and revenues of the property for which defendants are liable under the decree, and that thus amended, said decree remains undisturbed.

Rehearing refused.

No. 10,086.

THE STATE OF LOUISIANA VS. HENRY WILLIAMS.

While, as a general rule, uncommunicated threats are not admissible, yet where communicated threats, followed by subsequent attack and difficulty leading to a killing have been proved, evidence of other threats made between the communicated ones and the assault may be received as corroborating the evidence as to the communicated threats, as indicating their meaning and seriousness, as characterizing the purpose of the assault, as throwing light upon the acts of deceased in connection therewith and as establishing the reality of the danger under apprehension of which defendant may have acted.

A PPEAL from the Nineteenth District Court, Parish of Terrebonne.
Allen, J.

M. J. Cunningham, Attorney General, for the State, Appellee.

Tobias Gibson and W. F. Winchester for Defendant and Appellant.

The opinion of the Court was delivered by

FENNER, J. The sole question in this case is presented on the following bill of exceptions:

"Be it remembered that on the trial of this case, the State having shown by Gus Ridley, the first witness for the prosecution, a difficulty between the accused and the deceased, and that the deceased called the accused a broken jaw son-of-a-bitch; and also having shown, by George Champagne, another State witness, that the deceased said, 'I will kill you to-night, or you will kill me,' and that the deceased then left the bar-room, where the difficulty took place.

Whereupon the defense placed Louis Johnson on the stand, who

40	168
45	845
40	168
47	424

40	168
122	376

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testified that he was on the gallery of the barber shop about (40) forty feet from the bar-room when the difficulty took place, and the deceased in passing near him said, 'the damned broken jaw son-of-a-bitch hit me, and I am going to get even with him if I have to eat my supper in hell;' and the deceased returned to the bar-room in about a half hour, with a stick in one hand and something *shiny* in the other, like a knife or dirk, when his fatal wound was received; to which evidence of threats objection was made by the district attorney as not communicated to the deceased, and was sustained by the court, when in truth and in fact the said evidence was offered, as specially stated, for the purpose of showing that the presumption was that the deceased himself was the aggressor, and to show what was his intent in returning to the place of fatal encounter; for it has been held that threats made by the deceased against the defendant, shortly before the killing, the deceased being at the time of the killing armed to carry out such threats, are admissible as parts of the *res geste*, and are verbal acts indicative of a present purpose and intention, and why he sought the accused, and lastly because it corroborates the evidence of threats, which had already been shown by the State witnesses, which evidence the Court refused to let the jury have, and this bill reserved to said ruling, and shown to the district attorney for his approval, and found correct, before tendering to his honor the judge for his signature, and to be placed of record in this case."

The judge *a quo* prefaces his signature by a statement which does not dispute any of the facts stated in the bill, but gives an account of the encounter from which it appears that when the deceased returned to the bar-room, after the first difficulty, he had a walking stick and struck the prisoner. The prisoner again pushed or knocked the deceased down and went into the front part of the saloon. He afterwards deliberately returned with a pistol in his hand. The deceased when he saw the prisoner coming, ran, and just as he reached the back door of the saloon the prisoner shot him in the back and killed him.

We see no relevancy in this statement to the question of the admissibility of the evidence offered, whatever might be its effect.

We are presented with a case where threats had been made which had been communicated to the prisoner, and which were followed by an actual return of deceased in search of the prisoner, and by a hostile demonstration in the shape of assault and battery; and the question is whether, in a such a case, other deadly threats made by deceased to others in the brief interval of half an hour between the first difficulty

State vs. Holmes.

and communicated threats and the return of deceased and his hostile assault on the prisoner are admissible, although not communicated.

We have frequently affirmed the general rule that uncommunicated threats are not admissible, but all rules have exceptions, and we think reason and authority concur in establishing their admissibility under the circumstances indicated as corroborating the evidence as to the communicated threats, as indicating their meaning and seriousness, as establishing the purpose with which the deceased provoked the rencontre and throwing light upon his acts in connection therewith, and as confirming the reality of the danger under the apprehension of which defendant may have acted. The authorities to this effect are numerous. 2 Wharton, C. L. § 1027; Stokes vs. People, 53 N. Y. 164; State vs. Elkins, 63 Mo. 159; Cornelius vs. Com., 15 B. Mon. 539; Holler vs. State, 37 Ind. 57; State vs. Abbott, 8 W. Va. 741; State vs. Goodrich, 19 Vt. 116; Keener vs. State, 18 Ga. 194; State vs. Turpin, 77 N. C. 473; Campbell vs. People, 16 Ill. 17; State vs. Dodson, 4 Oregon 64.

We think there was error in the rejection of the testimony, and while its admission may not support the prisoner's defense, we think he was entitled to its benefit before the jury.

It is, therefore, ordered and decreed that the verdict and sentence be annulled and set aside, and that the case be remanded for further proceedings according to law.

No. 10,087.

THE STATE OF LOUISIANA VS. MONROE HOLMES.

The competency of objected testimony cannot be determined, if the complaint is first made when the statement of witness is reiterated. Having been once received without objection, it cannot be thereafter recalled.

An information charging a statutory offense is sufficient, if in the terms of the statute.

A PPEAL from the Nineteenth District Court, Parish of Terrebonne.
Allen, J.

M. J. Cunningham Attorney General, and *W. K. Wilson*, District Attorney, for the State, Appellee.

Chas. Belden, for Defendant and Appellant.

The opinion of the Court was delivered by
 WATKINS, J. The defendant was convicted of the crime of inflict-

ing a wound less than mayhem with a dangerous weapon, and sentenced to two years imprisonment in the penitentiary.

He seeks relief in this court on two grounds, viz :

1. That the trial judge erroneously permitted the State's witness, Clay Duplantis, to give in evidence a statement made by the prosecutor, Aurelian Toups, *several hours after* the wound was inflicted on him, the same being objected to as hearsay, and not admissible as part of the *res gestæ*.

2. That the indictment was, and is, fatally defective in not containing the *essential* averment that the defendant inflicted the wound wilfully and maliciously, and with criminal intent, and his motion in arrest of judgment was improperly denied.

I.

The judge assigns his reasons for permitting this witness' testimony to go to the jury, and in connection therewith he makes the subjoined extracts from the evidence in the case, viz :

"The witness Duplantis testified without objection that he found the prosecuting witness lying in an insensible condition in the field of O. Daspit, on the side of a cut of cane, and near a water drain where he had been working alone. He examined him, found him covered with blood, caused by ghastly wounds on his head and face. He attended him, and succeeded in arousing him to consciousness. The witness then asked him who had wounded him. He answered, 'the water-boy. He did it with an ax.' (The prisoner was the water-boy at that time on the Daspit place). This evidence was not objected to by the prisoner. On the contrary, his counsel cross-examined the witness at length on the fact. On being re-called, on re-examination, the district attorney asked the witness to state 'what else the prosecutor said then about the person who wounded him.' The witness said again : 'He said the water-boy struck him with an ax, nothing more.' The attorney for the prisoner then objected to the evidence on the ground that it was irrelevant and hearsay. The previous facts shown were: The prosecutor is a very old man and a cripple. He was working in a lonely portion of the plantation when attacked. There were no eye-witnesses to the crime. He was found by the overseer a short distance from where he had been struck down by his assailant, unconscious.

"When aroused to consciousness the first words he spoke were the words given above.

"The prosecutor was put upon the stand, but his mind was so affect-

State vs. Berard.

ed from the injury received that he could not give an intelligent account of the assault made on him.

"The court overruled the objection, because it came too late, after the evidence had already gone before the jury without objection, and because the previous facts show that this was a secret attempt at murder, and the time, place and manner in which the declaration was made, convinced the court that the jury should have it and consider it with the other testimony in the case."

The defendant's objection to this evidence cannot be considered, nor its competency determined, for the reason that his complaint is leveled at the witness' *reiteration* of a statement previously made in the presence of the jury, and, should we decide that the objection to it was well taken, we could not recall the statement first made.

It had been received without objection. His complaint was not seasonably made.

II.

Section 794 of the Revised Statutes declares that "whoever shall, with a dangerous weapon or with intent to kill, inflict a wound less than mayhem upon another person, shall," etc., and the information charges that the accused "did, with a dangerous weapon, *feloniously* inflict a wound less than mayhem upon one Aurelian Toups," etc.

It is an elementary principle in our criminal jurisprudence that an information charging a statutory crime is good if the language of the statute has been followed.

In this case the district attorney added the word *feloniously*, "out of the abundance of caution."

The words "wilfully," and "maliciously" were unnecessary, and "criminal intent" may well be inferred from the employment of the term "*feloniously*."

Judgment affirmed.

No. 10,056.

THE STATE OF LOUISIANA VS. CHARLES BERARD.

The words of a law are generally to be understood in their most usual signification.

When, in Act No. 100 of 1878, prohibiting the keeping of private markets within a *radius of six squares* of a public market, in New Orleans, the Legislature used that language, they had in view to fix an equal and uniform distance in order to avoid any arbitrary discrimination, and intended that the distance should embrace, *both*, the length of the squares and the width of the streets: in other words, 2100 and not 1800 feet, *American measure*, as contended by the defence.

The 3100 feet are to be computed from any point on the public market limits nearer the private market.

40	172
44	104
40	172
48	4

State vs. Berard.

A PPEAL from the Court of the Second Recorder, City of New Orleans. *Burthe, J.*

Blanc & Butler and *E. J. Wenck* for Plaintiff and Appellee.

Theophile Buisson for Defendant and Appellant.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The defendant appeals from a recorder's sentence condemning him to pay a fine for a violation of Act No. 100 of 1878, which prohibits private markets within a "*radius of six squares*" from a public market in New Orleans.

He charges the unconstitutionality of the law under which the fine was imposed, in this: that it suppresses a lawful business without justification, and that the fine imposed is illegal.

Under Article 81 of the Constitution, the case is before us on the law and on the facts.

On the question of constitutionality raised, it suffices to say that the law attacked has been several times judicially announced to be one adopted by the State, in the exercise of her police powers, to which there exists no constitutional objection.

The State contends, on the merits, that when the Legislature used the words, *radius of six squares*, the object in view was to fix and establish an equal and uniform distance, according to the known, popular and accepted English or American measurement, and that, tested by this standard, the distance would be composed of six squares each of three hundred American feet and of six streets of fifty American feet, the former to sum up 1800 and the latter 300, footing 2100 feet, American measure.

On the other hand, the defendant insists that the distance does not include the streets, but merely the squares, which measure together only 1800 feet, and that his place being beyond that space, though within 2100 feet from the public market, he is not in contravention.

The inquiry is therefore narrowed down as to whether the width of the *streets* is or not to be included in the distance which the Legislature fixed when it said that private markets shall not be kept within a *radius of six squares* of a public market, in this city.

It is clear that there can be no squares in a city unless they are divided by streets, and that the pieces of ground which are termed and designated as *squares*, in ordinary parlance, when a distance is to be stated, include the *streets*.

The text of the Code says, that terms of art or technical terms and

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phrases are to be interpreted according to their received meaning and acceptation with the learned in the art to which they refer, and it adds that the words of a law are generally to be understood in their most usual signification. R. C. C. 15 and 14.

Judging from the object and tenor of the act, it is obvious that the word *radius* was designedly used to have its technical meaning, i. e., to signify the length of the distance within which the prohibition was to be enforced.

A *radius* is a straight line drawn from the centre of a circle to any point of the circumference. Its length is half the diameter of that circle, or is the space between the centre and the circumference.

The centre for measurement from which the *radius* would shoot was not required to be located in the middle of the space occupied by a public market, which is usually not a square, but some other geometrical figure, a parallelogram, or a triangle, for the space between the centre and the external boundaries would have to be included in the length of the distance, and this would shorten that length.

The legislative object was to prohibit the keeping of public markets within a *radius* of six squares from a public market, the distance to be computed from the nearest point on the external line of the space occupied by the public market to the circumference, drawn from that centre, so that no private market be allowed within that circumference.

It is further apparent that when the Legislature used the language stated, it meant what was generally understood by the word *square*.

It required no evidence to show what that meaning is in this country. The Court can safely take judicial notice of it.

Should any one be asked to say how many squares Canal street is distant from Esplanade street, the answer would briefly be, *so many*; say; *thirteen*, and nothing more. No one would dream answering, *thirteen, the width of the streets excluded*; although possibly the squares do not measure equally.

It is evident, and in fact conceded, that the Legislature intended to fix an equal and uniform distance, so that A's private market might not be nearer the public market than B's, simply because, in the distance in A's case there would be found one or two short squares, and that in the distance in B's case there would exist regular or longer squares.

The only distance which the Legislature could have intended was that of six squares, including the width of the streets; in other words, twenty-one hundred (2100) feet for both squares and streets, and not eighteen hundred (1800), as urged by the defendant.

Judgment affirmed.

State vs. Woods et als.

No. 10,029.

40	175
46	830
40	175
114	841

THE STATE OF LOUISIANA VS. A. A. WOODS ET ALS.

A clear distinction exists in law as well as in fact, and must be observed by courts, between the business of an *insurance agent* and that of a person, firm or corporation *conducting or doing an insurance business*.

In the contracts of insurance negotiated by insurance agents the latter act only in a representative capacity, as intermediaries between the *insured* and the companies which they represent; in such contracts they do not own the premiums which they receive; they are not the *insurers*, hence never personally liable for losses.

Therefore they are not personally liable for licenses exacted by law of persons, firms or corporations who do and conduct an insurance business in this State.

A suit to enforce such a license against the agents personally cannot be maintained.

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

John McEnery and W. B. Sommerville, for Plaintiff and Appellee.

Harry H. Hall, G. A. Breauz and F. O. Zacharie for Defendants and Appellants:

I.

"Conducting an insurance business" is totally different from "conducting the business of insurance agency." Under the law imposing a license upon the former, recovery cannot be had against the latter. 31 Ann. 781; 33 Ann. 10.

II.

A license imposed under the taxing power for revenue is a tax, as distinguished from a license imposed under the police power. *Desty, Taxation*, pp. 191, 305; *Cooley, Taxation*, 186-592; *Cooley's Constitutional Limitation*, p. 616; 36 Ann. 363; 38 Ann. 711.

III.

Such a license tax must be "equal and uniform" upon all who engage in the same trade and calling. 22 Ann. 663, 449; 26 Ann. 140; 28 Ann. 102; 36 Ann. 95.

IV.

The Legislature may classify trades and callings, but that classification must be of different callings and not of different degrees in the same calling. *Cooley, Taxation*, p. 186.

V.

Graduate means "proportion," to mark with degree of equal part, and a law which imposes upon the insurance company doing a business of \$300,000, a license tax of \$1750, for say 1 per cent., and upon another company doing the same kind of business of \$100,000, in the same place, a license tax of \$300, or 3 per cent does not graduate the tax. V. 36, Ann. 95.

VI.

If the tax could be thus arbitrarily "graduated" (!) without proportion, it is obnoxious to the Constitution, because not equal and uniform. 36 Ann. 95.

VII.

If "equality and uniformity can be reconciled with 'graduation' it should be done." 36 Ann. 95.

The opinion of the Court was delivered by

POCHE, J. Defendants, who are engaged in the business of insurance agents in the city of New Orleans, resist the claim of the State

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for licenses under the provisions of section 7 of Act No. 101 of 1886, which reads as follows:

"SEC 7. *Be it further enacted, etc.,* That each and every insurance company (society), association, corporation or other organization or firm, or individual, doing and conducting an insurance business of any kind, life, fire, marine, river, accident or other in this State, whether such company, society, association, corporation, or other organization or firm, or individual, is located or domiciled here or operating here, through a branch department, resident board, local office, firm, company, corporation or agency of any kind whatsoever, shall pay a separate and distinct license on said business for each company represented, and said licenses shall be based on the gross annual amount of premiums on all risks located within the State, and upon risks located in other States or foreign countries, upon which no license has been paid therein, as follows, to-wit: "

They appeal from a judgment which condemned them to pay the licenses as claimed, with interest of two per cent per month on the amounts thereof and with recognition of a first privilege in favor of the State on their property.

Their main contention hinges upon the fact as alleged by the State, and proved by the record, that theirs is a business of *insurance agent*, and that they are therefore not amenable to a law which deals altogether and exclusively with corporations or persons "*doing and conducting an insurance business.*"

Under no rule of construction can the plain language of the statute hereinabove transcribed be held to refer to any other persons, firms or corporations but those who actually conduct an insurance business. A person, firm or corporation who does an insurance business takes risks and issues policies of insurance on its own account and responsibility. Those who carry on the business of insurance agents act only in a representative capacity, and place risks in insurance companies or corporations, either by soliciting business for their principals or in accepting for them risks or insurance business when tendered by third persons who desire to be insured. Insurance agents, in transacting their business, are not *insurers*; they are not the recipients or beneficiaries of the premiums paid on policies, and they cannot become personally liable for losses incurred under the risks accepted for their principals. In insurance contracts they occupy neither of the relations of *insurer* or *insured*, but they are merely intermediaries between those two classes of contracting parties.

Hence such persons cannot be legally held or defined to be persons, firms or corporations doing and conducting an insurance business of any kind.

It appears from the record that insurance agents are only amenable to the law which requires them to be authorized to be cited and to stand in judgment in our courts as mandataries of the insurance companies or corporations for whose account they enter into insurance contracts, either in suits for liabilities growing out of such contracts (acts of 1877), or "for all purposes connected with licenses and taxation" (act 101 of 1886, section 7); and it appears that these defendants have fully complied with the requirements of the statute.

The distinction between a person or corporation doing an insurance business and an insurance agent is clearly discernible in law as well as in reason, and it has been observed and enforced by judicial authority.

In dealing with the subject of insurance agents in the case of *New Orleans vs. Rhenish, Westphalia, Lloyds et als.*, 31 Ann. 781, this court used the following language:

"They negotiate insurance upon commission, and to increase their incomes they procure authority from foreign companies to place risks for them, * * * and they solicit the patronage of persons desiring to insure; * * * they are under no obligation to solicit for any particular company, each company simply agreeing to accept such risks as they may place for them; * * * this business is conducted in their own behalf and interest, they renting and furnishing their own offices and defraying all expenses out of their own means; * * * the policies delivered are issued by the companies at the places where they are domiciled, and said companies have and keep no offices here.

"Under this state of facts it is manifest that the business carried on by these parties is a distinct, separate and individual industry or occupation, and only taxable as such."

That case was followed by the present Bench in the case of *City vs. Virginia Insurance Company*, 33 Ann. 11.

The defendants in the instant case are shown by the record to be precisely the insurance agents described in the quotation from the case in the 31st Annual, and we know of no law, and have been referred to none which proposes to tax them in their said "separate and individual industry or occupation."

The attempt of the State, by means of this proceeding, is to make them personally liable for the license which is contemplated for the

Tutrix vs. Telegraph Company.

companies or corporations which they represent, and to subject their own property to the privilege created in favor of the State against the property of the parties who may owe the license provided for by the statute.]

Such a proposition finds no sanction in reason or justice, and much less in the very law under which the proceeding has been instituted. Hence the judgment appealed from cannot be sustained.

It is therefore ordered, adjudged and decreed that the judgment rendered below against the defendants be annulled, avoided and reversed, and that the rule taken herein against them be discharged and dismissed, without costs to defendants in either court.

No. 10,053.

MRS. L. E. CLAIRAIN, INDIVIDUALLY AND AS TUTRIX, vs. WESTERN UNION TELEGRAPH COMPANY.

The claim of the widow and children of the deceased for damages was properly presented in a single suit.

It is indispensable to an employer's exemption from liability to his servants for the consequence of risks incurred, that he should be free from negligence. He must furnish the servants the means and appliances which the service requires for its efficient and safe performance; and if he fail in that respect, and an injury result, he is liable to the servant.

A PPEAL from the Civil District Court for the Parish of Orleans.
Voorhies, J.

W. S. Benedict and W. E. Murphy, for Plaintiff and Appellee.

Bayne, Denegre & Bayne, for Defendant and Appellant:

1. The widow, individually, and as tutrix of her children, sues to recover damages for the loss of her husband, who was an employee of the defendant. Individually she seeks to recover the damages which she sustained, and the damages which the deceased sustained. As tutrix she seeks to recover the damages which the children sustained.
2. The exceptions should have been sustained. Under the Act of 1884, the widow cannot sue in her own right, and for her own use, for the damages suffered by the deceased where he leaves children. The right survives to her only when there are no children, and not jointly with them.
3. A telegraph company is not the insurer of its employees, and its obligations to them is to exercise reasonable and ordinary care in providing such suitable and safe apparatus as common experience shows to be proper in order to avoid exposing their lives to unnecessary danger in the discharge of hazardous duties. *Towne vs. R. E. Co.*, 37 Ann. 634; *Armour vs. Hahn*, 111 U. S. Rep. 318; *Randall vs. Baltimore and Ohio R. R. Co.*, 109 U. S. 478.
4. The claim here is that the cross arm and wire were defective. The evidence shows that the cross arm was such as was in ordinary and common use, and such as had been used

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48 981
49 27

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51 184
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108 412

40 178
111 527

40 178
c112 250
114 256
114 375

40 178
121 899

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for many years, and such as had been found to be the best for the purpose; that the wood of which it was made, and the manner of construction, were such as previous experience had shown to be proper, suitable and safe; that the wire was such as was and had been ordinarily used and found to be good, and had been used extensively just before and after the accident, and that this was the first and only time it broke.

Servants assume the ordinary risks of the employment upon which they enter, and as the wire and cross arm were such as were and are generally, commonly and constantly used, they assume the risks to which, if any, they may be thereby subjected.

5. If any injury befalls an employee by reason of a hidden defect which ordinary inspection and oversight would not detect, the master is not liable. It is one of the assumed risks of the employment. The servant takes the risk of any danger connected with the machinery or employment in which he is engaged, which ordinary inspection and carefulness on his part will disclose to him. 29 Ann. 791.
6. The servant is under the same obligation as the master to provide for his safety. It follows that, if the knowledge or ignorance of the master and that of the servant in respect to the character of the machine, etc., are equal, so that both are either without fault or in equal fault, the servant cannot recover of the master. Thompson on Negligence, pp. 1008 and 922; 6 Ann. 497; 125 Mass. Rep. 79, Cooley on Torts, 541.

This rule has been universally applied in cases of overhead bridges, depot roofs, machinery and appliances. 40 N. J. (Law), 23; 1 Lansing, 108; 63 N. Y. 449; 51 Maryland, 47; 50 Mo. 302; 78 Va. 709.

7. Moran (p. 31) and Borley (p. 120) say it is the duty of the lineman to put up cross arms, to reject them if they have any cause of suspicion, and to remedy anything they see wrong. McNulty, who put up the cross arm, was a fellow-servant of the deceased, in the same common employment. If McNulty was guilty of negligence, plaintiffs cannot recover.

The orders to the men engaged at block and tackle pulling up wires come from linemen. (McNulty, p. 76; Parsons, p. 87.) And the man at the reel is expected to look out for kinks. (Parsons, p. 114, and Donovan, p. 246.) Donovan, who was at the reel, was a fellow-servant in the same common employment. Kinks, if any existed, could be seen by ordinary inspection. In Randall vs. Baltimore and Ohio R. R. Co., 109 U. S. 482, there is a clear statement of who are fellow-servants.

8. "The servant who assumes the discharge of duties, the nature and mode of performing which are fully known to him, voluntarily subjects himself to risks necessarily incident thereto, and unless such risks are increased by some other fault or negligence of the master, injury resulting therefrom will not be the subject of reparation by the master." Wallis vs. Morgan's Louisiana and Texas Railroad Company, 38 Ann. 156; Satterlee vs. Morgan Company, 35 Ann. 1166; Rover on Railroads, 1198; Pierce on Railroads, 379; Wood on Master and Servant, 109 U. S. 484; Amour vs. Hahn, 111 U. S. Rep. 318.
9. The judgment gives interest upon damages, and should be reversed. 1 Ann. 382; 3 Ann. 702; 18 Ann. 28; 38 Ann. 191.

The opinion of the Court was delivered by

TODD, J. Louis E. Clairain, in the employ of the defendant company, while engaged in putting up telegraph wires on Carondelet street, in this city, fell from a telegraph pole and was killed.

This suit is brought by the widow of the deceased in her own right, and as natural tutrix of her minor children, issue of her marriage with deceased, to recover damages on account of his death—damages

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resulting from the sufferings of the deceased, and damages caused directly to the widow and children by the loss of the husband and father.

The cause and manner of the death is set forth substantially as follows:

That Clairain was employed by the company as a lineman in putting up and tying wires on their telegraph poles. That, whilst he was so engaged, some forty feet from the ground, and on a telegraph pole, it became necessary to stretch a wire on the outer end of a cross arm of the pole, their being five wires already strung on the pole, three on the inner and two on the outer side.

That in order to perform his work, it was necessary for him, by the aid of a steel spur or iron point, attached to one of his legs, to force the same into the telegraph pole as a support for his body, throw his other leg free of any iron support around the pole, and lean outward in a diagonal position from the pole to the outer wire of the arm attached to the pole, and there secure the telegraph wire with iron nippers or pincers, by a wire around the glass cup placed over the pin inserted in the cross-arm.

Whilst in this position, the wire being hauled taut many hundred feet ahead of him, by means of a reel and apparatus provided for that purpose by the company, the wire broke near the cross-arm at which he was: the cross-arm itself broke where it was fastened to a telegraph pole, and by reason of his then necessary position, he could not recover his center of gravity when the break took place, and was precipitated head'ong to the stoner beneath him. He was picked up and, after suffering intense agonies, died within a week, leaving a widow and three minor children as his heirs, deprived of his comfort, his support, his life.

It is specially charged that the wire furnished for the work which he was performing was second-hand wire, full of kinks, that is, where it had been twisted it had lost its strength, and that the cross-arm of the telegraph pole was of light material, too thin, improperly bored, and of such brittle nature as to be entirely unfit for the purpose for which it was used.

That Clairain has been for six years engaged in this business, both upon telegraph and telephone poles. That he was about thirty years of age, strong, active, and giving a regular support to his family.

The defendants excepted to the petition as follows:

1. That there was an improper joinder of parties upon distinct

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causes of action, and that the widow and children of the deceased could not in the same suit claim the damages which each have separately and distinctly sustained.

2. That the petition not specifying the quantum of damages suffered by the widow and the quantum of damages suffered by the children, and not giving any details or specifications of these damages, was too vague and indefinite to admit of proper answer and defense.

3. That in so far as the widow claimed that the cause of action of the deceased survived in her, her petition disclosed no cause of action

The first and third grounds of exception were overruled, and the second ground was maintained, with leave to amend.

Thereupon plaintiffs filed an amended petition, which, "reiterating the allegations of the original petition, averred:

"1st. That the damages sustained by the deceased, as hereinafter averred, survived in her minor children, of whom petitioner is natural tutrix.

"2d. That she individually had sustained \$5000 damages.

"3d. That her children had sustained \$5000 damages."

Defendant excepted that the supplemental petition, in so far as it alleged that the cause of the deceased survived in her minor children, was inconsistent with the original petition, and changed its substance.

This exception was overruled and the amendment allowed.

We think the ruling of the judge *a quo* on these exceptions was proper, considering that all the damages claimed resulted from one cause, and all parties in interest were before the court, and that the widow was suing both in her individual and representative capacities, and since a judgment final and conclusive as to all the parties could be rendered in the suit pending, it was better to end the controversy in the one suit than to remit the plaintiffs to two different actions.

The disposition made of the matter affords no just ground of complaint, and is sanctioned by several adjudications. 39 Ann., Riggs vs. Bell, and authorities therein cited.

The answer was a general denial and an averment of contributory negligence on the part of the deceased.

The case was tried by the judge, and from a judgment in favor of the plaintiffs for \$3000 the defendant has appealed.

There were many witnesses examined on the trial, and there is much conflicting testimony. We have thoroughly examined and considered it, and shall content ourselves with stating our conclusions respecting it, as it bears on the issues presented.

1. We are fully satisfied that there was no contributory negligence

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on the part of the deceased. There was no opportunity afforded him to test the strength and soundness of the wire and cross-arms furnished him, and which were required for the performance of the services for which he was engaged, and it is quite certain that had he insisted on making a sufficient test of them, and demanded that the requisite time be allowed him for that purpose, he would never have been employed. If there were defects in these materials it would have been impossible for him to have discovered them in the time that was afforded him. In fact, they were not discoverable on a slight inspection. There is no evidence of any want of care in the handling or manipulation of these materials in his work.

2. That both the wire and cross-arm broke in the manner described in the petition, there is no dispute, and that the death resulted from this breakage is equally admitted.

As stated, the testimony of many witnesses was taken to prove that those materials were perfectly sound, and *per contra* a number introduced to prove their unsoundness.

But, in our view of the matter the fact that they did break is a demonstration in itself that they were not sound, or at least of sufficient strength to answer the purpose for which they were used. For the evidence does not show satisfactorily that they were subjected to an extraordinary or unusual strain when the casualty occurred.

There was then no fault on the part of the employee.

It must be considered that the employment was a dangerous one, not dangerous in merely climbing or ascending the poles and reaching out to the ends of the cross-arms, and fastening the wires, but dangerous from the fact that the wire and its wooden support might chance to be defective and unsound. Those necessary for his work the employee had a right to presume were entirely safe, and he was entitled to rest on this presumption for his security. *Hanson, tutor, vs. Railway*, 38 Ann. 111.

And it further follows that the employment being a dangerous one, as conceded and asserted by the defendant's counsel, the defendant company, the employer, should be legally held to the greatest care and diligence in the selection of the necessary materials, and everything else calculated to insure the safety of the employee in the prosecution of his work. *Ib.* 10 Ann. 38 ; 14 Howard, 486.

"It is indispensable to the employer's exemption from liability to his servants for the consequence of risks thus incurred, that he should be free from negligence. He must furnish the servants the means and

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appliances which the service requires for its efficient and safe performance; and if he fail in that respect, and an injury result, he is liable to the servant as he would be to a stranger." *Chicago R. R. Co. vs. Ross*, 112, U. S. R. 383.

The next question that arises is: Did the Company comply with this requirement?

As stated, we are satisfied that the materials furnished the employee in this instance were not sound, and consequently not safe; and the record contains no evidence that these materials were carefully selected by the company, nor is there satisfactory proof that there was even a proper inspection of the same before being used.

Under these circumstances we are forced to the conclusion that there was not that degree of care and diligence shown by the company that under the legal principles we have announced, would exempt it from liability for the fatal injury to its employee in this instance. It was in fault, and from that fault resulted the death of the employee.

The judgment of the lower court is criticized by the defendant counsel as not being in accord with the pleadings, nor in response to the prayer of the petition in decreeing the amount awarded (\$3000) jointly in favor of the widow and the minor heirs.

This inaccuracy, if it be one, affords no ground of complaint to the defendant. It does not impose an additional burden, and it is a matter of indifference to the company, to whom the money goes, so that it is final and conclusive against all parties, which it is. There is no complaint of the plaintiffs in this regard, and the money, when realized, can be adjusted between the mother and her children, according to their respective rights.

Reaching the conclusions announced, we find no reason for disturbing the judgment of the lower court, and it is therefore affirmed with costs.

No. 10,061.

JEAN DESLOTTES ET AL. vs. BALTIMORE AND OHIO TELEGRAPH COMPANY.

At the request of a customer a country merchant telegraphed to his New Orleans merchant to ship two barrels of bi-sulphite of lime, the dispatch being addressed to 291 Rampart street. This street has two divisions, known as North and South Rampart street, each having a No. 391. The name not appearing in the directory the defendant's messenger carried the dispatch to 291 north Rampart, and being informed by the servant that S. Kahn lived there, left the dispatch and accepted the receipt of the householder. It turned out that Kahn lived on south Rampart; the dispatch did not reach him and the goods were not sent. Plaintiffs, at whose request the country merchant sent the dis-

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patch, were sugar planters who required the bi-sulphite to save their cane, which had been frosted, and they sue defendant for \$2500 for sugar and molasses lost. Held:

1. There was no privity between plaintiffs and defendant, the evidence showing that the country merchant acted, not as agent, but as merchant seeking to supply himself with goods in order to sell the same to a customer at a profit, and that the goods, if shipped, would have remained his property and at his risk until sold to the customer at a price agreed.
2. The failure to deliver resulted from the insufficient and incomplete address, and from no negligence of defendant, who pursued the customary and only practical method of conducting its business.
3. The damages claimed are too remote and wanting in causal connection. There is no reason why the default of a telegraph company in delivering an order for goods should be visited with heavier penalty than the default of a common carrier in the delivery of goods actually shipped, viz: the value of the goods at the point of destination.

A PPEAL from the Civil District Court, for the Parish of Orleans.
Monroe, J.

Leonard, Marks and Bruenn for Plaintiffs and Appellants.

J. R. Beckwith for Defendant and Appellee:

Telegraph companies, in the absence of statutory provisions, are not common carriers: their liability is not measured by the same rules; their relation to their patrons is one of contract. *Western Union Telegraph Company vs. Carew*, 15 Mich. 595; *Baldwin vs. U. S. Telegraph Company*, 45 N. Y. 744; *Ellis vs. American Telegraph Company*, 13 Allen; *Leonard vs. Telegraph Company*, 41 N. Y. 544; 2d Thompson on Neg. 636.

The rule of damages for non-delivering telegraphic messages is its natural and necessary consequence of the breach of the contract as contemplated by the parties interpreting the contract, in the light of the circumstances under which and the knowledge of the parties of the purpose for which it was made; and when a special purpose is intended by one party, but is not known by the other, and is not indicated by the message itself, such special purpose will not be taken into account in the assessment of damages for not sending. *Baldwin vs. Tel. Co.*, 45 N. Y. 744; *Cory vs. Thames Iron Works, L. R.*, Q. B. 181; *Leonard vs. Tel. Co.*, 41 N. Y. 544; *Hadley vs. Baxendel*, 9 Exch. 341; *U. S. Tel. Co. vs. Gildersleeve*, 29 Maryland 232; *Landaberger vs. Tel. Co.*, 31 Barb. 533; *U. S. Tel. Co. vs. Wenger*, 55 Pa. 262; *Candee vs. Tel. Co.*, 34 Wis. 471.

"The law, for wise reasons, imposes upon a party subjected to injury from the breach of a contract, the active duty of making reasonable exertions to render the injury as light as possible. Public interest and sound morality accord with the law in demanding this; and if the injured party, through negligence or willfulness allows the damages to be unnecessarily enhanced, the increased loss justly falls on him." *Hamilton vs. McPherson*, 28 N. Y. 72, 76. This is the general rule, but most aptly stated in this case.

Causa proxima non remota spectatur, applies where a telegraph company is in default, but their default is made to a party only by the operation of some other intervening cause. *Lowrey vs. Tel. Co.*, 60 N. Y. 198.

The opinion of the Court was delivered by

FENNER, J. On the 14th December, 1885, I. Wildenstein, a merchant of Jeannerette, in this State, sent the following dispatch over defendant's line:

"Jeannerette, La. Ship without delay two barrels bi-sulphate in

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liquid. I. Wildenstein. To S. Kahn, 291 Rampart street, New Orleans."

S. Kahn is a small merchant in New Orleans whose name does not appear in the city directory, and defendant had no guide to his location except the address in the dispatch.

Rampart street crosses Canal street, and above the latter is designated as south Rampart and below as north Rampart, and the numbering in each direction begins at Canal, so that there is a 291 Rampart above and also below Canal.

The messenger charged with the delivery of this dispatch took it to 291 north Rampart, which he found to bear the sign of Dr. Souchon. He says: "I pulled the bell and the servant came out. I asked her if Mr. S. Kahn lived there. She said Dr. Souchon lived there. I asked her if S. Kahn lived there, and she said yes, and she took the message and gave me ten cents. She signed the receipt in the name of 'Mrs. Dr. Souchon.'"

Shortly afterwards, Wildenstein called on the operator in Jeannerette and inquired if the message had been delivered. The operator communicated with the New Orleans office and was answered that it had been delivered, which answer he communicated to Wildenstein.

It turned out that S. Kahn lived at 291 south Rampart street, and of course the message never reached him, and the order was not filled.

Now come the plaintiffs, Deslottes and Lejeune, who are cultivators of sugarcane near Jeannerette, who aver that on December 14, 1885, their cane on 22 acres had been so effected by cold and frost that in order to manufacture the same into sugar and molasses it was necessary to have promptly two barrels of bi-sulphate of lime in liquid; that finding none of that article in Jeannerette they requested their merchant, Wildenstein, to telegraph for it; that he did accordingly telegraph, and that if the message had been delivered the bi-sulphate would have been received in time to save their cane; but that, owing to the fault and negligence of defendant in not making such delivery it was not received and they incurred thereby a loss of twenty-five hundred dollars, for which they now seek to hold defendant responsible.

Plaintiffs have no case for various reasons, viz.:

1. The evidence does not establish such privity between plaintiffs and defendant as would sustain the recovery. Wildenstein appears to have acted not as agent of the plaintiffs, but as a merchant who, at the request of a customer, sought to supply himself with goods which the latter wanted, in order to sell the same to him at a profit. The

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goods would have been the property, and at the risk, of Wildenstein until sold to plaintiffs at a price agreed on.

2. The evidence does not bring home such negligence to defendant as would make it liable for the non-delivery. The failure resulted from the improper or incomplete address of the dispatch. It was addressed to No. 291 Rampart street, without designating north or south, and was delivered at No. 291 Rampart street, after due inquiry and assurance that the party lived there. Had the address been 291 south Rampart street, the mistake would not have occurred. The absence of Kahn's name from the directory left defendant no means of determining which of the two Ramparts was meant, and the course pursued in making inquiry, and on being informed that the party lived in the house, taking the receipt of the householder or person receiving the dispatch, conformed to the customary and only practical method of conducting its business.

3. Moreover, the damages claimed are too remote and wanting in causal connection with the negligence complained of. The cause of plaintiffs' loss was the frosting of their cane. There was nothing in the dispatch to advise defendant that, in ordinary course, any such damages might flow from a mistake in delivery. We can discover no reason why the default of a telegraphic company in failing to deliver an order for goods should be visited with heavier penalty than the default of a common carrier in failing to deliver goods actually shipped; and it is well settled that the latter is measured according to the value of the articles. Sedgwick on damages, p. —, Segura vs. Reed, 3 Ann. 695.

Judgment affirmed.

No. 10,106.

CHARLES U. GAUDET VS. CHARLES J. GAUTHREUX ET ALS.

Rules applicable to estoppels *in pais* cannot always be invoked in cases of estoppels by recitals, particularly in judicial proceedings.

The law holds parties to their allegations of record, and does not permit them to falsify what they have solemnly declared to be the fact.

The only means by which courts can protect the integrity of judicial proceedings, is the sanctity which the law throws around them.

To the rule there are exceptions, within which this case does not fall.

A party who has judicially declared to have sold property to married women, authorized by their husbands and purchasing for *themselves*, will not be heard subsequently to say that he sold the same to the husbands and to claim from them a deficiency between the notes and the proceeds of the real estate, under judicial authority.

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A PPEAL from the Twenty-second District Court, Parish of St. James. *Rost, J.*

Robt. G. Dugué for Plaintiff and Appellant.

Sims & Poché for Defendants and Appellees :

1. It is of the essence of good conscience and morality that a party litigant should be consistent in his declarations, acts and demands before a court of justice. That is also the law, and it is as it should be, so that judicial forms and remedies may not be perverted to unworthy uses.
2. Our jurisprudence has uniformly recognized and enforced the wise and salutary doctrine which firmly binds a party to his judicial declarations and forbids him from subsequently contradicting his statements thus made. *Farrar vs. Stacy*, 2 Ann. 211; 29 Ann. 293; *Gridley vs. Connor*, 4 Ann. 416; 32 Ann. 962, 979; 33 Ann. 1370; 35 Ann. 743.
 "The doctrine is so firmly sanctioned both by reason and justice, that our courts have unhesitatingly extended its operation to the State itself." 28 Ann. 460; 28 Ann. 121; 34 Ann. 360; 30 Ann. 1309; 37 Ann. 107; *Greenleaf*, Vol. 1, p. 204; *Bigelow on Estoppel*, p. 293, Nos. 3 and 4.
3. The record clearly shows: That from the time of the sale by plaintiff and his wife of their undivided half of the plantation to the four Gauthreauxs, Charles, Lise, Aline (wife of Nicolle, appellee, and Céline (wife of Poirier, appellee)—31st of March, 1884—until plaintiff's receipt of their share of the proceeds of sale in the partition suit of Beltran, in April, 1886, he, plaintiff, studiously treated Aline and Céline Gauthreaux as part owners of the property and as his debtors. Their husbands (appellees here) had been entirely ignored up to that time as parties in interest: 38 Ann. 106, *Beltran vs. Gauthreaux et als.* After receiving the shares of Aline and Céline as co-proprietors of Beltran in the partition suit, and crediting a part of the amount on the notes held by him, plaintiff, in May, 1886, filed this suit against them and their husbands (appellees here) *in solido*, to recover the balance due on the notes. Appellees interposed the plea of estoppel, and it was sustained by the district court.
4. It is contended by the appellees that the principles and authorities above set forth and cited are directly applicable to the state of facts presented by the record, and that the judgment of the lower court ought to be affirmed.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is an action to recover the difference between the amount of certain notes and that which was realized by the judicial sale of real estate by which payment was secured.

It is brought against two married women, their husbands and two other persons, who signed the notes, which were issued in settlement of the price of the property subsequently thus sold.

It is founded upon the averment that the sale of the land was made to the husbands by the plaintiff, and that they are bound *in solido* for the difference claimed.

The defense is that the plaintiff is *estopped* from claiming any part

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of the notes from the husbands, because they never acquired the property and never bound themselves to the payment of the notes to any extent, the plaintiff himself having judicially admitted that, when he sold the property, he conveyed it to the *wives*, and that this declaration estops him from now pleading that he sold it to the *husbands*.

From a judgment sustaining the plea, the plaintiff has appealed.

It appears that after the maturity of the notes the plaintiff brought suit *via executiva* to enforce their payment, annexing a copy of the act of sale by him to the purchasers and also the original notes, to his petition.

The act declares that the vendor (plaintiff) sells his three-sixths, or one-half, of the property among others, to the two ladies, Alice Gauthreaux, wife of Arthur Nicolle, and Céline Gauthreaux, wife of Eugene Poirier, they being joined and duly assisted and authorized by their said husbands, all being present, accepting and purchasing *for themselves*, their heirs and assigns, now and forever, etc.

In the petition for executory process, the plaintiff averred that he had sold the real estate to the two ladies and two others, the former signing the notes, each, with the authority of her husband. The act and the notes form part of the petition in the present suit.

The declarations in both the act and in the petition are therefore clearly that the property was sold to, and the notes signed by, the *wives*, authorized by their husbands, and that they purchased *for themselves*.

If it be true that such was the case, how can the plaintiff be now heard to say that he sold to the husbands, who are liable as heads of the community?

He is concluded by his judicial averments, which consist not only of the allegations in the petition, but also of the reciprocal acknowledgment embodied in the act of sale, which is annexed to the petition as part.

The act does not purport in the least to be a purchase for the community or by the husbands. On its face, it purports to be a purchase by the *wives for themselves and heirs forever*.

This declaration would conclude the husbands and it does surely the vendor.

It may subserve some useful purpose, auxiliary to the views expressed and to the conclusions reached, to say that the property affected

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with vendor's lien and special mortgage to secure the notes in question was sold in a partition suit at the instance of R. Beltran, as co-owners, to which the plaintiff was a party, and that in the petition the wives and not the husbands were represented as co-proprietors.

Reference to those proceedings shows that it is out of the amount realized by the sale that the plaintiff received the sum with which the notes now sued on, were credited.

It is unnecessary to state how far the plaintiff may be considered as concluded by his acts and doings, but it may be asked whether, if, instead of receiving the proceeds, he had become the purchaser, he could have denied the co-ownership of the wives, and claimed title from the husbands.

The doctrine of estoppel, to which appellant refers, applies exclusively to cases of estoppel *en pais*, and not to cases of estoppels by recitals, or written admissions, the strongest of which is that of acknowledgments or declarations in judicial proceedings.

The law holds parties to their allegations of record. It does not allow them to play fast and loose, to falsify what they have solemnly declared to be a fact—the truth.

- Such averments are the highest evidence against the party making them. They are not subject to explanation or contradiction *ab extra*, as a rule; so that what appears to be of record is to be proved thereby only, and nothing conflicting therewith can be admitted. *Delacroix vs. Provost*, 6 M. 280; *Freeman vs. Savage*, 2 Ann. 269; also, 211; *Denter vs. Erwin*, 5 Ann. 18; *Gridley vs. Connor*, 4 Ann. 416; *Webster vs. Smith*, 6 Ann. 719; *Edson vs. Freret*, 11 Ann. 710; *Bigelow on Estoppels*, 4 (note), 266 et seq; 293 Nos. 3 and 4.

A previous court has well said:

“It is a well-settled rule in the administration of justice that a party will not be permitted to deny what he has solemnly acknowledged in a judicial proceeding. The only means of courts to protect the integrity of judicial proceedings are the sanctity which the law throws around them.” *Bender vs. Belknap*, 23 Ann. 765; see also *Devall vs. Watterston*, 18 Ann. 141; *New Orleans vs. Southern Bank*, 31 Ann. 564; 30 Ann. 1309; 32 Ann. 962, 979; 33 Ann. 1370.

To the broad rule for estoppel there exist numerous exceptions, but within these, the present case does not fall.

The district judge ruled correctly.

Judgment affirmed.

Martin vs. Muncy & Marcy.

No. 10,059.

ALPHONSE MARTIN VS. MUNCY & MARCY.

The right of action of an accommodation acceptor of a draft, and who pays or retires the same with his own means against the drawer, is for reimbursement, and it rests on the implied or conventional promise of the drawer to indemnify him.

By such a transaction the drafts have no longer any value as such, and the drawer is entirely discharged of all obligations thereon, his liability being to the acceptor for indemnity, and the draft being an item of evidence.

The fact that a member of a commercial firm in whose name negotiable paper has been issued by the managing partner, is ignorant of the transaction, and that no entry of the same has been made in the partnership books, will not release him from liability if it is in proof that the transaction had been made for and had enured to the benefit of the firm.

The acceptor who has paid such draft can recover only legal interest on the promise of indemnity.

A PPEAL from the Civil District Court for the Parish of Orleans.
Tissot, J.

Chas. S. Rice for Plaintiff and Appellee.

T. Gilmore & Sons for Marcy, Defendant and Appellant.

The opinion of the Court was delivered by

POCHÉ, J. This controversy arises out of the following facts:

Defendants were commercial partners as lumber dealers in New Orleans from August, 1878, to April 17, 1885.

In March, 1884, plaintiff, as an accommodation, endorsed a note of \$6000. executed by Muncy in the name of the partnership. After several renewals of the note the debt was placed in a different shape, and by consent of all parties it was represented by four drafts of \$1500 each, payable at three, six, nine and twelve months, with interest of 8 per cent per annum from date, March 14, 1884, signed in the name of Muncy and Marcy, to their order, and accepted by plaintiff.

Alleging that at the maturity of the three and six months' drafts he paid and retired them, plaintiff brings this suit to recover of the partners of the firm now in liquidation, and *in solido*, the aggregate amount which he alleges to have paid for them as accommodation acceptor, with 8 per cent interest per annum from March 14, 1885, until paid.

Muncy made no defense; Marcy pleaded a general denial, coupled with the special averment that he knew nothing of the existence of the drafts in question. He alone appeals from a judgment against both defendants *in solido*, with interests as prayed for.

Under a proper application of the universal rules which govern the

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rights and obligations of commercial partners, on proof of payment of the two drafts in question, plaintiff's right to recover of defendants the amount thus paid, as their accommodation acceptor, can hardly be questioned. Edwards on Bills, on Notes, etc., section 522.

But the pith of Marcy's defense is that the original loan of \$6000, which was the consideration of the note endorsed by plaintiff, was not a transaction, or for the benefit, of the partnership, but that the amount thus borrowed was used by Muncy in his own private affairs, entirely disconnected with the firm of Muncy & Marcy. Hence he contends that the two drafts accepted by plaintiff and representing in part the original loan, were tainted with the same nullity as an alleged debt of the firm, which characterized the original note of \$6000.

In support of that contention appellant relies on evidence which shows that he was entirely ignorant of the whole transaction; that the books contained no entry of the same, and that Muncy had had during the existence of the partnership many business transactions on his own individual account with plaintiff, who was, during all that time, in the same line of business as the firm. These facts are undeniably shown by the record.

But, on the other hand, the evidence shows that Muncy was the managing partner of the defendant firm, whose business was under his exclusive control; that Marcy paid little or no attention to the partnership operations or books, and that the business was conducted in a very loose and irregular manner, in consequence of which many of the most important transactions conducted by the managing partner, either on the streets or at the lumber exchange, were never reported to the book-keeper, and of course never entered on the books of the concern.

As an illustration, it appears from the record that Marcy's father, a man of wealth, who had assisted the firm, and had had large and important transactions with it, appeared on the books as its debtor for \$80, when in truth he was their creditor for \$20,000, as judicially demonstrated in suit by him against the firm at the time of its dissolution.

While the record does show that Muncy had had numerous transactions on his individual account with plaintiff, the evidence is conclusive of the fact that the sum of \$6000 realized on the note of March 13, 1884, endorsed by plaintiff, was actually used by Muncy, the managing partner, for the use and in the business of the firm. Under its

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effect plaintiff has discharged the burden of proof which was on him to show that the transaction had been made truly in the name and for the benefit of the firm. *Mechanics and Traders' Insurance Company vs. Richardson & Cary*, 33 Ann. 1308; *Mutual National Bank vs. Richardson & Cary*, 33 Ann. 1312.

Appellant's next contention is that the evidence is insufficient to prove the payment of the two drafts by plaintiff as acceptor, possession of the same being of itself insufficient to prove such payment. The possession of the drafts is undoubtedly an important link in the chain of evidence to that effect. *Edwards*, bills and notes, section 522.

And in this case that evidence is supplemented by the testimony of plaintiff and of the holder of the drafts. The latter testifies that the payment was effected partly in money and partly by securities transferred to him by the acceptor. This is a sufficient and legal payment; by it the drawers were fully discharged of all obligations resulting from the drafts, and through it they have become liable on their promise to plaintiff to reimburse him for such payment.

Appellant then makes the point that parol testimony is incompetent to prove the promise to pay the debt of another, in support of which he invokes the provisions of Act No. 208 of 1858, now article 2278 of the Civil Code.

But the prohibition therein contained has no possible application to the facts of this case. The promise of plaintiff to pay the debt of defendants was evidenced by the drafts, and therefore in writing; the promise to reimburse him was not a promise to pay the debt of another; the obligation was to pay their own debt.

Appellant's last contention is that plaintiff is not entitled to interest of 8 per cent per annum, as allowed in the judgment. That point is partially good.

The drafts were stipulated to bear 8 per cent per annum interest from date until paid.

That interest was paid by plaintiff, and defendants owe it to him. But the interest on the amount paid by him, from the date of payment until final settlement, was not determined by contract, hence it cannot be conventional, but only legal interest. The obligation of the drawers to reimburse their accommodation acceptor, is not shown to have been accompanied by any stipulation to pay any rate of interest, hence none but legal interest can be claimed.

Our conclusion is therefore that plaintiff is entitled to recover the full amount of the drafts, including 8 per cent per annum interest

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thereon, which had accrued at the time that he took them up, with legal interest thereon from the date of payment until final payment by defendants, and the judgment must in consequence be amended on the score of interests.

From the drafts it appears that interests had accrued on one of them to the sum of thirty dollars, and on the other to sixty dollars, the first having been taken up on June 17, and the other on September 14, 1885.

It is therefore ordered, adjudged and decreed that the judgment appealed from be amended by reducing the rate of interest allowed to plaintiff from 8 to 5 per cent per annum, said interest to run on the sum of \$1530 from June 17, 1885, and on the sum of \$1560 from September 14, 1885, until final payment, and that, as thus amended, said judgment be affirmed, costs of appeal to be taxed to plaintiff and appellee.

No. 10,058.

C. A. FISH & Co. vs. M. H. SULLIVAN.

A contract of affreightment by charter party is valid when made by parol, and when terminable at the will of the charterer.

There are two kinds of contract of affreightment by charter party. The first is where the owner agrees to carry a cargo which the charterer agrees to provide. The second is the contract of the instant case, that is to say, where there is an entire surrender by the owner of the vessel to the charterer, who hires the vessel as one hires a house, takes her empty, and provides the officers, crew, provisions, etc.

In such a contract, the charterer is substituted in the place of the owner, and becomes owner for the voyage, or owner *pro hac vice*. Here, therefore, the charterer and not the general owner is liable for materials and supplies.

In an action on account against the alleged owner of a ship for materials and supplies furnished the vessel, under the general issue the defendant may prove a charter party showing a demise of the ship to the charterer during the time covered by the account. Reaffirming *R. R. Co. vs. Heirne*, 2 Ann. 127.

A PPEAL from the Civil District Court, Parish of Orleans.
Monroe, J.

Aug. Bernau, for Plaintiffs and Appellees :

Where a ship owner is sought to be held liable for an indebtedness of the ship as such owner, he cannot, under the general issue, be permitted to introduce evidence to prove a charter party. 8 M. 207.

A bill of sale of a ship accompanied by possession does not in itself constitute a good title in law ; it is only *prima facie* evidence. It must be shown that the transfer is *bona fide* and for a valuable consideration. 16 Pet. 218 ; *Desty's Manual Shipping and Admiralty*.

The registry and enrollment of a vessel under the acts of Congress is, primarily, proof of

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her national character and of her home port, and the registry of a bill of sale of a vessel in the name of a person therein named as owner, without other proof of ownership, is not even *prima facie* evidence of such ownership, and a party may be shown to be the real owner, though the ship is registered in the name of another. 23 Penn. St. 76; 16 Pick 401; 1 Cliff. 370; Deety "Shipping and Admiralty," 6 Cal. 343.

Charter parties, though usually made in documentary form, may be made by parol. The presumption of law is against the demise of the vessel by the owner, and in the absence of conclusive proof to the contrary, a charter party will be construed to be a mere contract of affreightment. 78 N. Y. Rep. 50; Carver on Carriage by Sea; Deety on Shipping, etc.; 2 Curtis 102; 14 Wall. 607; 7 A. 337.

The existence of a charter party must be brought to the knowledge of third parties, and where parties were employed by a ship owner as agents and such agents made advances to the ship on the credit of his ownership, the burden of proof is upon the ship owner to show that the agents had notice of the charter party. Secret covenants, prejudicial to third parties, are not favored by the law. 7 Ann. 337; 6 Ann 461; 30 Fed. Rep. 451, 452; 14 Fed. Rep. 354, 355, 478; 17 Fed. Rep. 816; 12 Fed. Rep. 919; Pritchard Dig. Admiralty. 485; 2 Black 372.

C. H. Lavillebeuvre and Carleton Hunt for Defendant and Appellant:

Where the facts show, as they do here, that the defendant was not owner of a certain steamship during the time covered by the account sued upon for materials and supplies furnished the vessel, no recovery can be had.

A contract of affreightment by charter party is valid when made by parol, and when terminable at the will of the charterer.

There are two kinds of contract of affreightment by charter party. The first is where the owner agrees to carry a cargo which the charterer agrees to provide. The second is the contract of the instant case, that is to say, where there is an entire surrender by the owner of the vessel to the charterer, who hires the vessel as one hires a house, takes her empty and provides the officers, crew, provisions, etc.

In such a contract the charterer is substituted in the place of the owner, and becomes owner for the voyage, or owner *pro hac vice*. Here, therefore, the charterer and not the general owner is liable for materials and supplies. The Spartan, Ware's Reports, 149, 156; Abbott on Shipping; 6th American Edition of Perkins; Marg. 242; 3d Kent's Comm.; 12th Ed. of Holmes; Marg. page 204. Likgett vs. Williams, 4 Hare 456, 462; 2 Bonlay Paty, 268, 269; Parsons on Maritime Law, 274, 275; Taggard et al. vs. Loring, 16 Mass. R. 339; Perry vs. Osborne, 5th Pickering's R. 422; Cutler vs. Winsor, 6th Pickering's R. 338; Vinal vs. Burrill, 16th Pickering's R. 406; Muggridge vs. Evelith, 9th Metcalf's R. 236; Pontchartrain R. R. Co. vs. Hearne, 2d Ann. 131.

The principle of the maritime law is, that whoever deals with the master is, in all cases where the latter is acting within the scope of his duty, entitled to look to the ship as security. The liability of the ship *in specie* is not derived from the civil law, but had its origin in the maritime usages of the middle ages. The liability of the ship is primary, and not collateral or merely accessory. 1 Conkling's U. S. Admiralty 185; The Phebe, Ware's Repts. 263; The Rebecca, Id. 378; Norwich Co. vs. Wright, 13 Wallace Reports 103.

The opinion of the Court was delivered by

TODD, J. This is a suit to recover of the defendant \$3746.14 on account.

The petition alleges substantially that the defendant, a resident of

Pensacola, Florida, is indebted unto the petitioners in the sum above named for advances, payments made and merchandise furnished the steamship Kate Carroll, navigating the gulf stream and to Central America, of which said defendant was the owner.

The answer is a general denial.

From a judgment in favor of the plaintiffs for the amount sued for the defendant has appealed.

There is no dispute about the correctness of the account. That is, that the advances and payments charged were made to the steamer Kate Carroll and the merchandise furnished as stated in the account; but the whole controversy turns upon the question, whether the defendant was the owner of the vessel during the time covered by the account.

It is shown on the part of the plaintiff that they were the agents of the steamship during all the time she was navigating the waters mentioned.

That the steamer was brought to New Orleans by D. F. Sullivan, the brother of the defendant, and his partner in the lumber business in Pensacola.

That the vessel was first intended to be used in the lumber trade, and was for a while so engaged, but was subsequently and after a short time placed in the fruit trade and made monthly trips between New Orleans and Central America. Also,

That she was constructed at Wilmington, Delaware, at a cost of \$95,000, and paid for by D. F. and Martin H. Sullivan, the partners in the lumber business, or as the plaintiffs contend, by Martin H. Sullivan alone. Also,

That the steamer's accounts with the plaintiffs were regularly sent to D. F. & Martin H. Sullivan at Pensacola, and after the death of the former in June, 1884, to the latter alone.

It is further shown that the defendant in his conferences or conversations with the plaintiffs on the subject of the steamer and the business connected with the steamer, referred to it, using the language of the witnesses, as "my steamer," "my boat," etc.

This evidence, if it stood alone, would, we are free to say, warrant a judgment in favor of the plaintiffs, as the judge *a quo* evidently concluded.

But it does not stand alone. The defendant produces a written act of sale of the steamer from the Harlan and Hollingsworth Company of Wilmington, Delaware, by whom it was built, dated May 28, 1883, purporting to convey and sell the vessel to John J. Sullivan, of New

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York, and D. F. Sullivan, of Pensacola, for \$95,000 cash, in the proportion of $\frac{2}{3}$ interest to the former and $\frac{1}{3}$ to the latter, and the vessel was so registered at the port of New Orleans under the requirements of the U. S. R. Statutes prescribing the regulations of commerce and navigation. And in the specifications of the company which built the steamer, called for by plaintiffs and produced and filed, it is shown that the vessel was built for D. F. Sullivan, of Pensacola, Florida.

Martin H. Sullivan, the defendant, was heard as a witness in the trial in the lower court, and on this question of the ownership of the vessel we extract the following from his examination:

Q. Look at the charges in the bill, in the first place, and say whether, at the time those charges were made, you were owner in whole or in part of the steamer Kate Carroll?

A. No, sir. I wasn't owner nor holder in whole or in part. I wasn't owner in whole or in part.

Further on he was asked to explain his interest in or his relations to the steamer, and we again quote:

"A. I was acting as agent for the steamer, and she was under my control.

Q. I understand you were acting as agent for whom?

A. For the owners of her.

Q. That is your brother?

A. Yes, sir.

Q. That brother who was interested with you in the same business?

A. No, sir.

Q. What brother was that?

A. My brother in New York.

Q. What were the initials of the brother in New York?

A. John J. Sullivan.

Q. Was there not another brother also in Pensacola with you?

A. Yes, sir; there was.

Q. Was he interested in this steamer?

A. Yes, sir; he was interested to the amount of one-eighth of her.

Q. Were you agent for him, too?

A. Yes, sir; agent for him, too."

It is shown that besides being engaged in the lumber business the defendant was, also, the owner and president of the First National

Bank of Pensacola. The cashier of this bank, W. A. S. Wheeler, testified on this point as follows (quoting):

“Q. Mr. Wheeler, will you look at the date of the enrollment of the vessel, and first the date of the bill of sale; what is the date of that?”

A. The 28th of May, 1883.

Q. Now turn over and see when it was recorded in the customhouse in New Orleans?

A. November 4th.

Q. Of what year?

A. 1884.

Q. Why was it that it was recorded as late?

A. Because we did not know that it was necessary to have it recorded. I had it recorded myself in the customhouse.

Q. What was your reason for recording it?

A. We did not know that it was necessary before.

Q. Why was it necessary to have it recorded?

A. So as to protect the insurance, and there was a heavy fine for not enrolling it.

Q. Between these two dates, the date of recording and the date of the original bill of sale, in whom was the ownership of the vessel?

A. In John J. Sullivan and D. F. Sullivan.

Q. Were there any other owners in it?

A. No, sir.

Again we find in the record the testimony of McConnell, the clerk and book-keeper of D. F. & Martin H. Sullivan in their lumber business, to the following effect:

Q. Do you know who the owners of the Kate Carroll were?

A. I do, sir.

Q. Who were they?

A. John J. Sullivan and D. F. Sullivan.

Q. Do you know in what proportion?

A. John J. Sullivan owned seven-eighths and D. F. Sullivan one-eighth.

Q. I recollect your being in court when Mr. W. A. S. Wheeler testified?

A. Yes, sir; I was called as a witness and I was present.

Q. You heard what he said?

A. Yes, sir; I heard pretty much all. I may have been absent for a few minutes during the giving of his testimony.

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Q. Are you able to say who the owners of the Carroll were during the time covered by the account of the plaintiff in this action?

A. Well, I am able to say, that from the time she was built up to the time she was sold, which covers the period during which the business was done, in this interim she was owned just as I stated just now, seven-eighths by John J. Sullivan and one-eighth by D. F. Sullivan.

There was a rigid cross-examination of these several witnesses, and some of the facts elicited thereby might be construed as lessening to some extent the weight of their testimony, but the full force of their answers above reported cannot be considered as seriously impaired.

As corroborative of the alleged fact that Martin H. Sullivan was not the owner of the vessel when the indebtedness charged accrued, proof was made that, during the time covered by the indebtedness, the steamer was chartered and run by another person, one John B. Guttman.

Objection was made that such proof was not admissible under the general issue, but that a charter party should have been specially pleaded.

Under the authority of the case of the Pontchartrain R. R. Co. vs. Hearne, 2 Ann. 129, where the precise point was adjudicated, we think the testimony was properly admitted.

This charter party was made by parol, and the contract was between D. F. Sullivan, one of the owners, and John B. Guttman, and terminable at the will of the owners.

There is no dispute between the parties that a valid charter party may be made by parol. 1 Parsons Maritime Law, 274; 16 Mass. R. 339; 5th Pickering, 422; 6th Ib. 338.

A charter party is of two kinds. One is where the owner agrees to carry a cargo which the charterer agrees to provide.

The second is where there is an entire surrender by the owner of the vessel to the charterer who hires the vessel as one hires a house, takes her empty and provides the officers and crew provisions; and, in short, the entire outfit.

In such a contract the charterer is substituted in the place of the owner, and becomes the owner for the voyage, or owner *pro hac vice*, and as such owner is liable for materials, supplies, etc. The Spartan, Ware's Reports, 149, 156; Abbott on Shipping; 6th American Edition of Perkins; Marg. 242; 3d Kent's Comm.; 12th Ed. of Holmes; Marg. page 204; Lidgett vs. Williams, 4 Hare 456, 462; 2 Boulay Paty, 268, 269; Parsons on Maritime Law, 274, 275; Taggard et al. vs. Loring,

State vs. Allen.

16 Mass. R. 339; Perry vs. Osborne, 5th Pickering's R. 422; Cutler vs. Winser, 6th Pickering's R. 338; Vinal vs. Burrill, 16th Pickering's R. 406; Muggridge vs. Evelith, 9th Metcalf's R. 236; Pontchartrain R. R. Co. vs. Hearne, 2d Ann. 131.

This charter party is established by the same witnesses to whom we have referred.

Their entire testimony has been severely criticised and is charged to be unreliable, but it was not sought to be impeached during the trial by assailing directly their veracity; and unless we reject their testimony as wholly unworthy of belief and place the stigma of perjury upon it, and at the same time pronounce the act of sale of the vessel and its registry as fictitious and simulated, we cannot escape the conclusion that the defendant was not the owner of the "Kate Carroll" during the time covered by the account sued on.

It is denied that the plaintiff ever had notice of the charter of the vessel, and one of the plaintiffs testifies to this effect. He is, however, opposed by the testimony of at least two witnesses; and besides, it is shown to our satisfaction that the money for the charter of the vessel was paid by Guttman, the charterer, through the plaintiffs—a fact that certainly brings home to them a knowledge of the fact.

There are several bills of exceptions in the record besides the one noticed above touching the admissibility of evidence allowed; we have examined them all and do not pass upon them separately, because our determination of them one way or the other could not alter our conclusion announced touching the pivotal fact of the controversy.

We have made a close study of the evidence in this case, and this examination has been the more thorough, perhaps, out of a disinclination we always feel of disturbing the conclusion reached by the lower court upon an issue involving mainly a question of fact, but this examination has served to make us realize more fully the great preponderance of evidence in favor of the defendant and produced the conviction that he is not legally liable for the debt sued for.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be annulled, avoided and reversed, and that the plaintiffs' demand be rejected at their costs in both courts.

No. 10,088.

THE STATE OF LOUISIANA VS. LOUIS ALLEN.

To a charge of shooting with intent to commit murder, a verdict returning guilty of an assault with a dangerous weapon, is not responsive.

40	199
45	1488
40	199
107	202

State vs. Allen.

A PPEAL from the Nineteenth District Court, Parish of Terrebonne.
Allen, J.

M. J. Cunningham, Attorney General, and *W. K. Wilson*, District Attorney, for the State, Appellee.

Chas. Bolden for Defendant and Appellant.

The opinion of the Court was delivered by

BERMUDEZ, C. J. On an indictment for "shooting with intent to commit murder," the jury returned a verdict of "Guilty of an assault with a dangerous weapon."

The accused moved an arrest of judgment, on the ground that the verdict is not responsive to the charge and formed no offense known to the law.

From the judgment overruling the motion, and from the sentence passed upon him, the accused prosecutes this appeal.

The charge is evidently made under Sec. 791 of the R. S. —, while the verdict is for an offense denounced by Sec. 793, which provides against assaults upon another, with a dangerous weapon.

The facts charged were shooting with murderous intent; the finding is assaulting with a dangerous weapon.

If, on the charge as made, the jury could have returned the verdict they did, why should the Legislature have enacted Sec. 793 of the R. S.?

It is impossible to conceive how, under the charge of shooting with felonious intent, a verdict can be accepted as responsive which returns that no shooting, but that a mere assault has occurred, and finds no intent.

The offense for which the verdict convicts the accused is a distinct, independent one from that charged. It could not have been included in a charge of shooting with intent to commit murder, as from it the offense set forth in the indictment could not be traced back.

The assault must have preceded the shooting, because there can be no shooting unless an assault has previously been made, and there may be an assault without any shooting.

If it were claimed that assaulting with a dangerous weapon could be covered by a charge of shooting with intent to commit murder, the inclusion would come within the rule that two separate offenses cannot be embraced in the same count without vitiating the indictment. *State vs. Murdock*, 35 Ann. 729.

In the case of *Hendricks*, this Court held that, under a charge of

shooting with intent to commit murder, under Sec. 791 R. S., a verdict of guilty of shooting with intent to kill was not only unwarranted because finding for no offense known to the law, but also because it was not responsive to the charge. The case was remanded. 38 Ann. 682.

In the present instance we therefore find that the verdict returned is not responsive, and that the defendant is entitled to the new trial which he asks.

It is therefore ordered and decreed that the verdict herein be quashed and the judgment and sentence upon it be annulled and reversed, and that this case be remanded to the lower court for a new trial and further proceedings according to law.

No. 9341.

40 201
113 282

PRESIDENT AND BOARD OF CHURCH WARDENS OF THE CONGREGATION
OF THE ROMAN CATHOLIC CHURCH OF THE PARISH OF ASCENSION
VS. RIGHT REV. N. J. PERCHÉ, BISHOP, ET AL.

Acquiescence by appellant in the judgment appealed from defeats the right of appeal.

Thus, in a contest between the bishop of a diocese and a board of church wardens, involving the right claimed by the latter, denied by the former, of administering the temporal affairs of a church, in which the legal existence of the corporation represented by the board, is the main issue in the cause, acts of the bishop by which he recognizes the authority of such board and deals with them as such touching the administration of the church, after rendition of the judgment complained of, will be fatal to his right of appeal.

A PPEAL from the Twenty-second District Court, Parish of Ascension. *Duffel, J.*

R. N. Sims and *E. N. Pugh* for Plaintiffs and Appellees :

MOTION TO DISMISS.

The opinion of the Court was delivered by

POCHÉ, J. In this suit, which involves the right contested between plaintiffs and defendants of administering the temporal affairs of the Catholic Church of the parish of Ascension, plaintiffs and appellees moved to dismiss the appeal on the ground that appellants had acquiesced in the judgment appealed from.

When this court came to consider that motion last year it was found that the facts on which it was grounded were not of record, and hence

Board of Church Wardens vs. Bishop et al.

it was concluded to remand the matter to the District Court for the purpose of taking testimony on the question of the alleged acquiescence of appellants in the judgment complained of. 39 Ann. p. 223.

The record of that evidence is now before us, and on examination, we find therein full proof of the facts alleged in the motion of appellees.

Defendants' contention had put at issue the very existence of plaintiffs as a corporation, in consequence of which the authorities of the diocese had removed the curate in charge of the church, which thus had been stripped of its spiritual functions or direction, at least during the pendency of the suit, by means of which the legal right of possession of the church and of its appurtenances was to be determined.

Now the record which contains the evidence taken on the motion to dismiss, shows that since the rendition of the judgment appealed from, the archbishop of the diocese entered into a written agreement with plaintiffs as church wardens, looking to a united administration of the temporal affairs of the church.

Under and by virtue of that agreement a priest, appointed by the bishop as curate of the church, has since been officiating as rector, receiving his instructions in temporal affairs from the church wardens, to whom he has accounted for all revenues collected by him, and from whom he has received his salary and that of his vicar assistant, and with whom he has continuously participated in all necessary acts of administration, reporting to them, and for their consideration and approval, all such acts which, in their nature, had to be attended to and performed exclusively by himself.

It also appears that the bishop himself has received from plaintiffs his share accruing from the revenues of the church, as specified in the written agreement herein above referred to. These and other similar acts involve the appellants in an unqualified recognition of the legal authority of plaintiffs in all matters connected with the administration of the temporal affairs of the church, the absolute denial of which authority was the pivotal issue covered by the judgment appealed from; and they therefore sustain appellees' allegation of acquiescence. *Stinson vs. O'Neal*, 32 Ann. 947.

Hence, the present appeal cannot be sustained. It is therefore ordered that this appeal be dismissed at appellants' costs.

State ex rel. Moss & Co. vs Judge.

No. 10,098.

THE STATE EX REL H. MOSS & CO. VS. S. CHAS. YOUNG, JUDGE OF THE
NINTH DISTRICT COURT.

40	803
44	89
40	203
48	459

Where numerous suits have been instituted against a common debtor by a number of creditors, accompanied in some cases by attachments and in others by sequestrations, and the property seized under the writs has been sold by written consent of all parties, and the funds are in the hands of the sheriff, the debtor cannot be permitted to release the seizures and take the funds in his possession upon executing his bond (one bond) wherein the agreement for the sale signed by him it is expressly stipulated "that the proceeds of the sale shall remain in the hands of the sheriff subject to the claims, rights, liens and privileges of the seizing creditors." Whatever may have been his legal rights, the agreement became the law to him

APPLICATION for Mandamus.

C. J. & J. S. Boatner and Alfred Goldthwaite for the Relators.

H. L. Lazarus for the Respondent.

The opinion of the Court was delivered by

TODD, J. There were instituted against the relators, in the District Court of the parish of Tensas, nineteen attachment and ten sequestration suits. Their property was all attached and part of it sequestered. It consisted mainly of a large stock of merchandise.

By agreement between the seizing creditors and the relators (defendants in the several suits), the property was sold and the proceeds received by the sheriff, who still holds them.

At this stage of the proceedings the relators applied to the judge of the court, Hon. S. Charles Young, for leave to bond the property and have the same released to them. This application was opposed by a number of seizing creditors, and the judge refused to grant the same. Thereupon the relators applied to this Court for a mandamus to compel him to do so, and this is the proceeding before us.

The judge, in answer to the preliminary order requiring him to show cause for his refusal complained of, after reciting the number of the suits before him, the conflicting character of the claims therein prosecuted, expresses a doubt whether one bond executed by the relators would afford the proper security for all the creditors, and further points to the written agreement of the parties (including the relators) as being opposed to the right claimed by the relators to be put in possession of the property or its proceeds.

State ex rel. Moss & Co. vs. Judge.

The clause in the agreement referred to, bearing on this point, is as follows:

"It is further agreed that the proceeds of said sale shall remain in the hands of the sheriff, subject to the claims, rights and liens of the various alleged creditors, it being agreed that this agreement is in no way to affect, waive or prejudice the claims, rights, liens and privileges of the various alleged seizing creditors, and that each party shall have the right to assail and contest the claims, writs, liens and privileges set up by all other parties as fully and completely as they now have and can."

The application to bond was strenuously opposed by the seizing creditors upon the ground of this agreement. They urged that it was on the faith of the understanding that the funds were to remain in the hands of the sheriff that they consented to the sale of the property *pendente lite*.

Considering the number of suits, the conflict among the creditors as to their respective rights, and considering further that, with the funds in court, these rights of the contending creditors could not only be determined but realized and satisfied in the present proceeding so far as the funds went, but with the funds withdrawn, and a bond substituted for them, after such determination of their rights in the present proceeding they must necessarily be relegated to what might prove a protracted, uncertain and complicated litigation on the bond, it is manifest that this clause in the agreement must have been regarded by the parties—and was entitled to be so regarded—as an important and controlling feature therein.

The relators bound themselves that, when the property was sold, its proceeds should remain in the hands of the sheriff, subject to the judgment to be rendered in determining their respective rights thereto.

In view of this obligation of the relators and its materiality touching the interests of the opposing litigants, we can come to no other conclusion than that this agreement was virtually a renunciation of any right or privilege on the part of the relators to withdraw those funds from the sheriff's custody and assume the control and disposition of them by means of the bond proposed. To do so would certainly contravene their plain, positive agreement.

Whatever the legal right of the relators was, apart from this agreement, the agreement became the law to all the parties thereto, and by its terms they must abide.

Thus concluding, we think the judge *a quo* was right in refusing

 State vs. Demouchet.

permission to the relators to execute the bond proposed and take the funds in question into their possession and control.

It is therefore ordered that the provisional restraining order heretofore issued be set aside and annulled, and the madamus refused at the cost of the relators.

 No. 10,085.

THE STATE OF LOUISIANA VS. PETER DEMOUCHET.

The right of a person accused of a crime, that is triable under act 35 of 1880, by a jury of five, to peremptorily challenge *six* jurors, was decided in *State vs. Everage*, 33 Ann. 120, adversely to the defendant's pretensions, and correctly. That decision is therefore affirmed.

A PPEAL from the Twenty-first District Court, Parish of St. Martin.
Mouton, J.

M. J. Cunningham, Attorney General, and *C. H. Mouton*, District Attorney, for the State, Appellee.

E. Simon for Defendant and Appellant.

The opinion of the Court was delivered by

WATKINS, J. The defendant was indicted for petit larceny and tried by a jury of five, under act 35 of 1880, and has appealed from a conviction, and sentenced to one year's imprisonment at hard labor. His complaint of the proceedings is that the trial judge incorrectly disallowed his sixth challenge to a juror, on the ground that the law allowing six challenges is unconstitutional. In refusing this peremptory challenge, the judge relied on the opinion of this Court in *State vs. Everage*, 33 Ann. 120.

In that case the Court had under consideration the acts 35 and 36 of 1880, and carefully weighed and passed upon their validity and constitutionality, and decided that the *proviso* in the latter, permitting to accused persons, in such trials as this, *six* peremptory challenges, was unconstitutional and void, because such an object was not expressed in the title of the act, and that the former was in full force. We think that opinion is correct, and the ruling of the trial judge is approved.

Other questions are argued in the brief of defendant's counsel which cannot be considered, for the reason that the record discloses that no bills of exception were retained by him to the rulings of the judge, at which he feels aggrieved.

Judgment affirmed.

40	205
115	482

State ex rel. Jacobs vs. Judge.

No. 10,018.

THE STATE EX REL. J. W. JACOBS VS. THE JUDGE OF THE ELEVENTH
DISTRICT COURT, PARISH OF NATCHITOCHES.

Mandamus lies to compel a district judge to grant an injunction *in limine* to any purchaser whose property is seized for the payment of the price of a thing sold to him, whenever suit has been instituted against him, for the recovery of the property; the more so when, from the showing made, it appears that a judgment of eviction was rendered contradictorily with the seizing creditor in favor of the plaintiff in revindication; that the judgment has been executed, and the debt has been partially extinguished.

In passing upon cases of this class the Court does not propose, in the least, to trench upon the merits of the controversy, as it acts merely on the face of the papers, and as, during the trial, facts may be established and a standpoint taken which would justify adverse conclusions.

A PPLICATION for *Mandamus*.

Egan & Pierson for the Relator.

W. G. McDonald and *E. E. Buckner* for the Respondent.

ON REHEARING.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is an application for a *mandamus*.

The relator complains that he has applied in vain to the district judge for an injunction to arrest the sale of certain property seized and advertised to satisfy part of the price of purchase, claimed by Yale & Bowling to be due them, and that it was the duty of the district judge to have granted his prayer.

He rests his demand on the averment that suit had been brought against him by one Carter for the ownership of part of the property; that on notice to them of this suit, Yale & Bowling intervened therein and that judgment was finally rendered in May, 1887, by the United States Circuit Court for the western district of this State, in favor of the plaintiff, Carter, evicting him, the relator, from the property claimed.

The district judge declined the injunction, on the ground that the same issues had been raised and adjudicated upon, adversely to the relator, by a judgment of his court in the same case, which was affirmed on appeal. Reference is made to the suit of *Jacobs vs. Yale & Bowling*. 39 Ann. 359.

There exists material differences between the first and the second injunction proceedings.

In the first case, the cause of action was apprehension of eviction, arising from the institution of the suit by Carter.

In the instant case, the cause of action, which did not exist when the first suit was brought, is actual eviction after judgment in favor of Carter.

In the first proceedings Carter was not a party and, from the showing made in the second proceedings by the plaintiff in injunction, it appears that Yale & Bowling made themselves parties to the suit in the federal court, by intervening therein, after notice had been given them, by Jacobs, of its institution.

In the case on which this Court passed and in which it had been alleged that Carter had brought before the United States Circuit Court an action to revindicate half of the property, it was held, as between Jacobs and Yale & Bowling only, that the threatened eviction of Jacobs in consequence of Carter's suit, was a fraudulent scheme, gotten up to enable him to resist the payment of the price of the property to Yale & Bowling. This decision was rendered in March, 1887.

It now appears that the suit to which allusion was made in that decision was determined in the same month and year by the federal court.

It is therefore apparent that while the judgment of the Eleventh Judicial District Court, affirmed on appeal, was in favor of Yale & Bowling, it did not conclude Carter, who was not a party to it; and, again, that, although Carter is not bound by that decision, Yale & Bowling are concluded by the federal adjudication.

Hence it is clear that what had been previously declared to be a fraudulent scheme was not subsequently decreed to be so, and that Jacobs, in consequence of this adjudication, is entitled to protection, the more so, as what he had at first conceived to be *threatened eviction* has turned to be, under his sworn averment here, an actual eviction.

If then it be true that Carter has obtained a judgment, binding on Yale & Bowling, which recognizes him as the owner of an undivided half of the property sold by the latter to Jacobs, and that he has evicted the latter therefrom, it is clear that Yale & Bowling have no right to enforce the payment of the whole price of sale by seizure of the property which they had sold Jacobs and of part of which Carter was judicially recognized the owner, and that Jacobs, not being bound for that entire price, has a right to arrest their proceedings and seek relief.

The Code is explicit that an injunction will issue on the application

State ex rel. Jacobs vs. Judge.

of any purchaser whose property is seized for the payment of the price of a thing sold him, whenever suit has been instituted against him for the recovery of the property, and where the debt has been extinguished in some legal manner. C. P. 298 § 9, 739 § 3.

The writ of Yale & Bowling issued for the balance due on Jacobs' notes, aggregating \$3000, subject to a credit of \$1300 and under it, the property was seized.

Jacobs does not seek to enjoin in order to obtain the nullity of the sale of the property, for he appears to be satisfied with owning an undivided half of it.

His purpose is simply to protect his half from sale for the payment of that portion of the notes which was the consideration for the purchase of the half recovered by Carter in the federal court, and which has been extinguished by the eviction mentioned. In other words, he opposes the sale of his half to pay \$1500, which he says he does not owe.

The law clearly allows an injunction to suspend payment of the price where danger of eviction is apprehended in consequence of a suit revindicating the property sold. *A fortiori* does it allow that remedy where the suit has ripened into a judgment on execution of which partial eviction has taken place and the debt has been partially extinguished. C. P. 739 § 3.

It has accordingly been held that an injunction lies against an order of seizure for the price of land of part of which the vendee has been evicted since the sale; also where want of consideration is pleaded, or where a claim in diminution of price for deficiency in quantity of land sold is set up. 17 L. 75, Banaux vs. Cazeaux; 7 L. 65, Greenwell vs. Roberts; 14 Ann. 868, Davis vs. Millaudon; 15 Ann. 689, Walker vs. Cucullu.

Otherwise Jacobs could have no standing to champion the rights of Carter.

Whatever the views be, which we have just expressed, we do not in the least propose to trench upon the merits of the controversy, as, during the trial, facts different from those which we assume to exist on the face of the papers, may be established, new issues may be raised, other standpoints taken, which may subvert that assumption and upturn the conclusions based upon it, however authorized our course may presently be under the circumstances and this sort of a proceeding.

We are simply of the opinion that Jacobs has made a sufficient show-

State ex rel. Schroeder vs. Mayor.

ing to entitle him to preliminary relief. R. C. C. 2557; C. P. 298 §9; 739 § 3; 36 Ann. 579; 38 Ann. 924.

The present judgment, by the formal consent of the district judge, becomes final on its rendition.

It is therefore ordered and decreed that the previous decree herein rendered be set aside and that a peremptory mandamus issue to the district judge directing him to grant the injunction *in limine* asked by the relator to arrest the sale of the undivided half, the title to which is undisputed, subject to the further order of his court on the merits of the cause, on plaintiff complying with legal requirements.

Watkins, J., recuses himself.

No. 10,100.

THE STATE EX REL. JOHN SCHROEDER VS. G. L. VAY, MAYOR OF THE
CITY OF BATON ROUGE.

Under an ordinance of the city of Baton Rouge the owner of a dog was ordered by the mayor of the city to produce the animal at his office that it might be killed. The dog was brought to the mayor's office in compliance with the order, but the killing was prevented by an injunction from a competent court. Thereupon the owner of the dog was sentenced to imprisonment in the parish jail for twenty days. Held, that the sentence was null and the action of the mayor arbitrary and oppressive.

A PPLICATION for Mandamus and Prohibition.

Geo. H. Braughn and *Geo. W. Buckner* for the Relator.

T. Jones Cross, City Attorney, for the Respondent.

The opinion of the Court was delivered by

TODD, J. The relator, in his petition to this court, alleges substantially:

That on the 15th of December last he was arraigned before the mayor of the city of Baton Rouge, and was condemned to produce a Newfoundland dog—his property—at the office of the mayor, to be shot to death, “or, (quoting) in default thereof, to pay a fine of fifty dollars or be confined in the parish jail for twenty days, until the dog be shot.”

That he produced the dog at the mayor's office in compliance with the order, but at the same time sued out an injunction before the district court of the parish of East Baton Rouge, restraining the killing of the dog; that the mayor, upon learning of the injunction, ordered

State vs. Perkins.

relator to be confined in the parish jail in accordance with the sentence aforesaid.

He charges that the mayor in thus acting transcended his authority and jurisdiction; that the sentence was illegal, and was neither authorized by any ordinance of the city of Baton Rouge or law of the State.

He accompanies his petition by a copy of the proceedings of the mayor's court and of the ordinance of the city under which the mayor purported to act.

He asks for a writ of prohibition and such other and further relief as the law would afford him.

The mayor, in his answer to the application of relator, substantially admits the truth of relator's allegations, but justifies his action in sentencing him to jail on the ground that the dog was not in fact produced to be killed, in compliance with his order, but the killing was prevented by a resort to a writ of injunction.

The record of the proceedings and copy of the ordinance produced verify fully the allegations of the relator and sustain the charge that the conduct of the mayor in the premises was arbitrary and oppressive and without the sanction of law and municipal authority.

The ordinance in question is entitled "Dog Ordinance," and merely provides for the killing of dogs running at large on the streets, but denounces no penalty whatever against the owners of such animals or against any one for a violation of the ordinance. Nor are we pointed to any law of the State, and know of none, under which the action of this officer can obtain the least justification or its enormity be palliated.

Under the enlarged terms of the prayer of the petition, and all the proceedings before us, we feel authorized to grant full relief.

It is therefore ordered, adjudged and decreed that the sentence complained of by the relator be annulled and set aside, and the writ of prohibition be made peremptory at the costs of the relator.

No. 10,096.

THE STATE OF LOUISIANA VS. JOSHUA PERKINS.

The Supreme Court has no concern with the evidence adduced before the jury touching the innocence or guilt of the accused. It deals with questions of law only, when presented in proper shape.

A verdict may be legally rendered, received and recorded, where the accused voluntarily leaves the court room and fails to appear after the sheriff's proclamation to come and hear the verdict about to be rendered. He cannot be permitted to take advantage of his own wrong to defeat the ends of justice.

40 210
44 1121
40 210
112 335

State vs. Perkins.

An accused cannot be allowed, in a motion for a new trial, to urge surprise at the reception of certain testimony during the trial, when he, at the time, sought for no relief. His omission implies a waiver of what right he may have had on that score.

The absence of a witness affords no ground for a continuance or new trial, when it appears that the testimony would be hearsay, and, if admitted, would have been merely contradictory in part, with a tendency to impeach the credibility of witnesses on the trial.

A PPEAL from the Fourteenth District Court, Parish of Calcasieu.
Read, J.

M. J. Cunningham, Attorney General, for the State, Appellee.

Geo. H. Wells & Son for Defendant and Appellant.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The defendant appeals from a conviction of larceny and sentence upon it.

He complains :

1. That his application for a continuance owing to the absence of a material witness was illegally overruled, and
2. That his motion for a new trial, based on several grounds, should have been sustained.

It is useless to consider presently the bill to the refusal of the trial judge to continue the case, as that refusal is made one of the grounds upon which the motion for a new trial rests.

Those grounds will be considered and disposed of *seriatim*.

They are the following :

1. That the verdict of the jury is contrary to the law and evidence.

We have repeatedly held that we have no concern with the sufficiency or insufficiency of the evidence adduced to show the guilt or innocence of the accused, and have authority to pass upon questions of law only arising in the course of the proceedings and presented in proper form for consideration.

2. That the verdict was rendered, received and recorded during the absence of the defendant from court and without his consent or request.

It appears that the accused, who was in the custody of his sureties, absented himself from the court house, and that, though he was several times called by the sheriff by proclamation at the court house door, he failed to come and hear the verdict, as required by the proclamation. The fact is that the accused has actually absconded, though he subsequently returned and was present when sentenced.

The accused cannot be permitted to take advantage of his own wrong to defeat the course of criminal justice.

It has accordingly been well held, that a cause may proceed to verdict where the prisoner who was on bail, left the court room and went away. Bishop Cr. Prac., vol. 1, § 272.

It has again been held, that if the trial is once commenced and the prisoner, of his own wrong, leave the court, abandons his case to the management of his counsel and runs away, the proceedings will not be stayed and the verdict may be legally received. Wharton's P. P., § 549.

3. That defendant was taken by surprise by the testimony of certain named witnesses.

There is nothing to show that the accused pleaded surprise at the reception of the testimony. His omission to have done so implies a waiver of what right he may have had on that ground.

He sought for no relief; none was declined, and no bill was or could be taken.

The complaint on that score comes too late, on a motion for a new trial.

4. That if defendant could have had the benefit of the presence of his absent witness, named Ashworth, he would have established facts which would probably have changed the result of the trial.

The district judge, who heard all the testimony adduced and who considered the lengthy *affidavit* of the accused, says that the evidence of that witness, if admitted, would certainly have been merely contradictory in part, with a tendency to impeach the credibility of witnesses heard on the trial.

A reference to that *affidavit* confirms that conclusion, as it is apparent that the object in view was to establish what one witness, at least, had declared, to the absent witness, a declaration which, after all, might have amounted to hearsay only, and would have been excluded.

It is somewhat strange that the *affidavit* on which such reliance is placed for a continuance appears to have been made the day preceding that on which the motion was called, and that it refers to the absence of the witness, although made at the calling of the case.

The accused presents no case for relief.

Judgment affirmed.

State vs. Adams et al.

No. 10,101.

THE STATE OF LOUISIANA VS. W. B. ADAMS ET AL.

In a criminal trial of two parties, jointly indicted for the same offense, the testimony of the wife of one of them is admissible for or against the other, under instructions from the trial judge to the jury to restrict such testimony to the case of the other defendant.

In a criminal trial of two parties, jointly indicted, where conspiracy has been proven, in the opinion of the trial judge, the declarations of one of the conspirators, although made in the absence of the other, are admissible against all the defendants.

The conduct of counsel who bring up appeals in criminal cases, and give no further attention thereto, is to be deprecated.

A PPEAL from the Fourth District Court, Parish of Winn.
Bridger, J.

M. J. Cunningham, Attorney General for the State, Appellee.

H. Bernstein for Defendant and Appellant.

The opinion of the Court was delivered by

POCHÉ, J. This appeal is brought up by the defendant, Adams, who had been indicted for murder jointly with another. The latter was acquitted by the same jury, who convicted appellant of murder without capital punishment. His complaints are embodied in five bills of exception:

I.

He charges error in the ruling of the trial judge, who admitted the testimony of appellant's wife over his objections. He invokes the legal restriction which prohibits husbands and wives from being witnesses for or against each other in criminal trials.

But the wife's testimony was introduced by the State, not against her husband, but against the other accused, and the judge guardedly instructed the jury to consider the testimony strictly within the restriction under which it was offered, so that the wife's testimony should not have any bearing on her husband's case.

Under the provisions of Act No. 29 of 1886, which allows the party accused in a criminal case to testify, one of two or more parties accused can make a witness of one of his or their co-defendants, under the restriction that the evidence of the witness should not be considered by the jury as applying to his case. And we see no objection to a similar course in order to secure the testimony of the wife of one of the accused.

We do not feel authorized to interfere with the ruling of the district judge on this point.

II.

The second bill involves the discussion of the judge's ruling in ad-

State vs. Adams et al.

mitting the testimony of a State witness touching a conversation between the witness and one of the defendants, not in the presence and hearing of the other. The judge justifies his course by the fact that previous evidence in the cause had proved, to his satisfaction, that a conspiracy had been formed between the two defendants then on trial to kill the deceased.

The question is thus placed under the scope of the ruling in Ford's case, 37 Ann. 459, by which the judge was guided, and by which he is unquestionably upheld.

III.

In his charge to the jury the judge reiterated his instructions previously given touching the restricted effect to be observed in the consideration of the testimony of the wife of one of the defendants.

Counsel for both defendants objected to the charge on the ground that it was "incompetent for the presiding judge to charge the jury as to what effect testimony given before them should have." The objection is either frivolous or captious, or it was made in entire misapprehension of the true meaning of the charge. Its plain and justifiable object was to caution the jury within legal bounds in considering the testimony given by the wife of one of the parties on trial, and it cannot be subjected to a construction which would involve the judge in weighing or analyzing the effect of the testimony on the issue of guilt or innocence of the accused.

IV. AND V.

The fourth and fifth bills have reference to the refusal of two special charges suggested by counsel for defendants. Both were refused because neither had any bearing, as principles of law, on the state of the case, as shown by the facts which had been established by the evidence heard on the trial. The contention of defendant's counsel is now completely obsolete; it involves a point long since removed from the domain of discussion. *State vs. Ford et al.*, 37 Ann. 464.

It again becomes our painful duty to note that in this, a capital case, counsel for the accused has thought fit to bring up an appeal, to which he has given no further attention since the date of its filing (January 4, 1888). Although our previous deprecations of such conduct appear to remain unheeded, we must reiterate our warning, in the hope that the subject may fall within the attention of the Legislative branch of the Government, and that the growing evil may there be checked or remedied. *State vs. Paul*, 39 Ann. 795; *State vs. Williams*, 37 Ann. 311.

Our examination of the record has satisfied us that appellant's complaints are groundless.

Judgment affirmed.

State vs. Venables.

No. 10,102.

THE STATE OF LOUISIANA VS. ABE VENABLES.

To entitle an accused to a continuance on the ground of the absence of a witness, he must show due diligence to procure the testimony; and the continuance was properly refused where no subpoena issued for the witness until the case was called for trial, although the witness resided in the town or city where the court was held.

Motions for new trials are left largely to the discretion of the trial judge, and unless the record makes it apparent that his discretion has been unwisely or arbitrarily exercised, his rulings thereon will not be disturbed.

A PPEAL from the Seventeenth District Court, Parish of East Baton Rouge. *Burgess, J.*

M. J. Cunningham, Attorney General, and *L. D. Beale*, District Attorney, for the State, Appellee.

Buckner & Moore for Defendant and Appellant.

The opinion of the Court was delivered by

TODD, J. The defendant was convicted "of shooting with intent to commit murder," and appeals from a sentence of two years' imprisonment at hard labor.

1. His first complaint is the refusal of the judge to grant him a continuance on the ground of the absence of a material witness.

We find from the record that the witness was not subpoenaed until the cause was called for trial.

It is manifest that due diligence was not shown, and for this reason the trial judge very properly overruled the motion.

2. He complains of the refusal of the judge to grant him a new trial.

The ground of the motion was that of newly discovered evidence, supported alone by the affidavit of the accused. The overruling of the motion was not excepted to.

We find no reason to conclude that the discretion of the trial judge in refusing the motion was not wisely exercised.

Rulings on motions of this kind, which the law leaves so largely to the discretion of the judge, will not be disturbed unless it is made apparent by the record that this discretion was abused and there was an arbitrary use of judicial authority.

Judgment affirmed.

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State vs. Evans.

No. 10,115.

THE STATE OF LOUISIANA VS. COLUMBUS EVANS.

The crime of shooting with intent to murder *while lying in wait*, denounced by Sec. 790, R. S., and that of shooting with intent to murder, without the circumstance of *lying in wait*, denounced by Sec. 791, not only belong to the same generic class, but every element of the lesser offense is necessarily included in a charge of the greater, which simply adds the aggravating circumstance of *lying in wait*.

Under an indictment for the major, the prisoner could be convicted of the lesser crime, proof of the first necessarily involving proof of the last.

The authorities fully sustain the right of the State to abandon or enter a *nolle prosequi* as to the aggravated circumstance enlarging the crime and to proceed under the indictment for the lesser offense alone.

This does not alter or amend the indictment or convert it into an indictment not found by the grand jury. The minor offense was charged in the bill as found equally with the major.

After such abandonment there was no necessity of a new service of the indictment.

There was no error in permitting the original indictment to be read by the jury, with the accompaniment of the entry on the minutes showing the abandonment of the aggravating circumstance.

The verdict is to be construed as responsive to the indictment as modified.

A PPEAL from the Tenth District Court, Parish of Red River.
Hall, J.

M. J. Cunningham, Attorney General, for the State, Appellee.

Egan & Pierson for Defendant and Appellant.

The opinion of the Court was delivered by

FENNER, J. It is important to state exactly the proceedings in the court below, which are complained of with great earnestness, ingenuity and learning by the defendant's counsel.

Sec. 790 of the Revised Statutes provides: "If any person *lying in wait*, * * * shall shoot, stab or thrust any person with a dangerous weapon, with the intent to commit the crime of murder, he shall, on conviction thereof, be punished with death."

The following, Sec. 791, declares: "Whoever shall shoot, stab or thrust any person, with intent to commit murder, under any other circumstances than these mentioned in the preceding section, shall, on conviction, suffer imprisonment at hard labor," etc.

It is obvious that the crimes denounced not only belong to the same generic class, but that every element of the lesser offense is necessarily included in a charge of the greater, which simply adds thereto the aggravating circumstance of *lying in wait*. It is plain that, under an indictment for the greater, the prisoner might be convicted of the lesser crime, because proof of the first would necessarily involve proof of

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State vs. Evans.

the last. State vs. Delaney, 28 Ann.; Wharton's Cr. L., §§ 384, 627; Bishop Cr. L., §§ 885 *et seq.*

In this case the bill of indictment found by the grand jury charged that the defendant "did, *while lying in wait*, willfully, feloniously and of his malice aforethought, shoot one Sam Naley with a dangerous weapon called a shot gun, with the intent then and thereupon, the said Sam Naley, willfully, feloniously and of his malice aforethought, to kill and murder, contrary to the form of the statute of Louisiana in such cases made and provided, and against the peace and dignity of the same."

Leaving out the words "*while lying in wait*," the indictment is perfect for the minor offense denounced by Sec. 791, R. S.

On the 26th of July, 1887, the following entry was made by the court on motion of the district attorney: "The district attorney formally abandons that part of the indictment which charged the defendant with lying in wait, and the trial is to be upon the charge of shooting with intent to murder, while not lying in wait. Defendant, present in open court, waives arraignment, and pleads not guilty and asks for trial by a jury."

The entry further shows that the trial was thereupon proceeded with.

A bill of exceptions, however, shows that the defendant objected to going to trial, on the grounds substantially: 1. That the *nolle prosequi* of the charge of *lying in wait* was in effect a *nolle prosequi* of the entire indictment, and entitled him to his discharge. 2. That he had not been served with a copy of any indictment except the original one found by the grand jury, and could not be tried without due service of the altered or amended one on which he was to be tried.

On the first point defendant's counsel contends that a *nolle prosequi* of one part of an indictment containing but a single count is a *nolle prosequi* of the whole. Citing Brittain vs. State, 7 Humph. (Tenn.) 159; People vs. Porter, 4 Parker Cr. C. 524, and State vs. Byrd, 31 Ann. 419.

The case last referred to and the Tennessee case, we think, fully recognize the right of the State to strike out or abandon the words that charge the malice or felony or other mere aggravation which enlarges the crime, and to prosecute only for the inferior offense, which remains sufficiently charged in the indictment without such words of aggravation; and this is all that has been done in the instant case. We can see nothing but benefit to the defendant which could result from such abandonment; for since, without it, he could be lawfully

State vs. Evans.

convicted of the lesser offense, why should he complain of being relieved of all chance of conviction of the greater?

The case from Parker's Reports seems to go further, but we think it is contrary to the overwhelming weight of authority as well as of reason.

Thus says Mr. Bishop :

"While the simple form of the *nolle prosequi* is to the entire indictment, it may be equally well to a part of the counts, or even to a separable part of any one count; thus—on an indictment for assault with intent to murder, there may be a *nolle prosequi* as to the aggravated intent, and a conviction for simple assault." Bishop C. P. § 1391, vol. 1; State vs. Merrill, 44 N. H. 624; State vs. Burke, 38 Maine, 574; 21 Maine, 341; 24 Maine, 71; Aaron vs. State, 39 Ala. 75; 105 Mass. 586; 109 Mass. 349; Baker vs. State, 12 Ohio, 214; 11 Gray, 1; 20 Pick. 356 (leading case); *contra*: People vs. Porter, 4 Parker C. C. 524.

There is no question here of an amended indictment, or of trying a defendant upon an indictment so altered as to be no longer an indictment which was found by a grand jury. As we began by saying, the indictment preferred by the grand jury, in charging the major offense, necessarily and unequivocally charged the lesser, as is demonstrated by the fact that when the aggravating words, "while lying wait," are eliminated there remains a perfect indictment for the minor offense. Hence the indictment required no amendment, and the State simply elected to abandon the aggravating circumstance and to proceed on the remaining minor charge, as is undoubtedly authorized by the authorities quoted.

For these reasons the case of *ex parte* Bayne, recently decided by the United States Supreme Court, does not apply.

The same considerations dispose of the other objection. Defendant was duly served with a copy of the only indictment found by the grand jury, which was the same on which he was tried and which was a sufficient basis for finding him guilty of shooting with intent to murder, either with or without "lying in wait."

Another exception was taken to the reading to the jury of the indictment as originally found. There was no other indictment to be read, and when accompanied by the reading of the entry on the minutes abandoning the element of "lying in wait," it sufficiently informed the jury that, though the major offense had been charged, the defendant was to be tried only for the minor offense included in the

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same charge. The same view disposes of the objection to the verdict of the jury.

We have given careful consideration to the case and can discover no error in the proceedings prejudicial to defendant.

Judgment affirmed.

No. 9,955.

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LEHMAN, ABRAHAM & CO. VS. JAMES GODBERRY, JR.—EMILE LEGENDRE, THIRD OPPONENT.

In case a junior mortgagee, for a consideration that is satisfactory to himself, intervenes in a subsequent act of mortgage in favor of a senior mortgagee to secure plantation advances to the mortgagor, and postpones thereto the rank and priority of his own, has no ground of complaint if the proceeds of the crop, to which the advances were made, are applied to its discharge, even though the advances were not necessary plantation supplies, there being no clause in the act making such a limitation.

Such a clause being incorporated in the *proces verbal* of the deliberations of a family meeting, recommending the postponement—the intervenor being an interdict—will not be considered as a restriction on the contract of mortgage in the absence of other provisions on the subject therein contained.

The phrase "that said sum of \$20,000 shall be exclusively used for the cultivation of the crop," indicates that a duty was imposed on the mortgagor who borrowed the money, and not on the lender, who could not control its use or destination.

A PPEAL from the Civil District Court for the Parish of Orleans.
Houston, J.

White & Saunders for Plaintiffs and Appellees.

E. W. Huntington, James Legendre, and Berault & Chenet for Third Opponent and Appellant.

The opinion of the Court was delivered by

WATKINS, J. This is a third opposition, in which Emile Legendre, a junior mortgage creditor of the defendant, James Godberry, seeks to regulate the distribution of the proceeds of the sale of the *Terre Haute* plantation, in satisfaction of the first mortgage of plaintiffs for the sum of \$58,458.00, and of his own for \$60,000.00. His claim is that the amount of plaintiffs' demand against Godberry is excessive and should be reduced to \$15,400.58, and that when a sufficient amount of the proceeds of sale of the mortgaged property has been applied to extinguish it, there will remain a surplus of \$12,000 to be applied to Godberry's indebtedness to him.

This controversy arises on the following state of facts, viz.: On the 22d of December, 1883, the defendant consented a mortgage on

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his Terre Haute plantation in the parish of St. John the Baptist, in favor of Edward F. Stockmeyer & Co., to secure his six notes of \$10,000 each, with interest, etc. On the 23d of January, 1884, he consented a mortgage in favor of plaintiffs, as his cotton factors and commission merchants, to secure his four notes, aggregating \$42,000, in which E. F. Stockmeyer & Co. intervened and granted them (Lehman, Abraham & Co.) priority in rank. This indebtedness to plaintiffs was subsequently reduced to the amount now claimed by them, by the application thereto of the proceeds of the crop of 1884.

On the 15th of November, 1884, E. F. Stockmeyer was interdicted, and Carl Stockmeyer appointed his curator. On these moneys, it seems the defendant had operated his plantation prior to the beginning of 1885, though unsuccessfully, and by which accumulated indebtedness he was embarrassed. In this position of affairs plaintiffs were unwilling to make him any further advances, and at first, declined to make them, and suggested that he look for another merchant who would take up the debt due them and advance him the amount he required to carry on his plantation for the year 1885. He made the effort and failed and returned to the plaintiffs and renewed his entreaties for assistance. After some deliberation they consented to give it on the condition that he should obtain the postponement of the Stockmeyer mortgage to one he should grant in their favor, securing said advances for 1885. To accomplish this object it was necessary that a family meeting should be convened, on behalf of the interdict, to recommend said postponement.

Thereupon the curator presented to the court a petition for the convocation of a family meeting, in which the following representations are made, viz. :

"That said Lehman, Abraham & Co. are on the point and have threatened to foreclose their first mortgage against said plantation ; that at the present juncture and critical condition of the money market your petitioner is of opinion and avers that a forced sale of said property at the present moment, under said first mortgage, would seriously and materially impair the interest and injure this said mortgage claim of said interdict ; that the said Lehman, Abraham & Co. are willing to forbear from foreclosing their first mortgage in consideration of their obtaining a priority of mortgage on said Terre Haute Plantation, to secure the future advances which they proposed to make to James W. Godberry during the year 1885, to carry on and cultivate said plantation, which advances up to October, 1885, will probably amount to \$20,000, and on the condition that a lien and

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privilege will be granted said Lehman, Abraham & Co. on the whole crop and proceeds thereof, to secure the advance which shall be made before and during the grinding, to be to such an amount and such an extent as may be necessary to take off and gather the crops, and as may be consented to by Lehman, Abraham & Co.; to which mortgage of \$20,000 for advances made before grinding, the mortgage in favor of Edward Stockmeyer shall be subordinated in rank, and on condition that no means will be taken to foreclose during the present year the mortgage on behalf of said interdict; and on the further condition that the crops as received shall be first imputed to any advance made *during its shipment* and the mortgage to secure any *ultimate balance up to \$20,000 which may exist after imputation of the crops to the advances*; and the curator of the interdict to be forced to intervene in and sign the act with the above and foregoing stipulations. (The Italics are ours.)

“That the object in view of all parties is to promote the interest of all concerned by enabling said Godberry to make a future crop on said plantation, which will, in all probability, enable him to reimburse not only said advances, but to extinguish the first mortgage of \$23,000, above recited, to Lehman, Abraham & Co., and thus enabling the second mortgage of the interdict to become first in rank and priority.”

This recital was adopted by the family meeting, and incorporated into the *proces verbal* of their deliberations, and thereafter they made the following declarations and recommendations, viz.:

“And the said members, after mature deliberation, and consultation on the subject matter of said petition, which is hereinafter expressed, unanimously declared that, considering the facts and allegations contained in said petition, and the reasons therein given, which they adopt as their own, it is the interest of the interdict that the mortgage for \$20,000 be granted by James W. Godberry, on said Terre Haute plantation, to secure Lehman, Abraham & Co. for the future advances which they propose to make to James W. Godberry, during 1885, to carry on and cultivate said plantation, and which advances, up to October 1, 1885, will probably amount to \$20,000.

“That a lien and privilege be granted said Lehman, Abraham & Co. on the whole crop and the proceeds thereof, to secure the advances that shall be made before and during the grinding season (which shall be considered as beginning from October 1, 1885), the latter, *i. e.*, those made during the grinding season to be to such an amount and such an extent as may be necessary to take off and gather the crops, and as may be consented to by Lehman, Abraham & Co.

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"To which said mortgage of \$20,000, for advances made before grinding, the mortgage granted in favor of Edward F. Stockmeyer, on the 23d December, 1883, before Zenon Miller, recorder of the parish of St. John the Baptist, shall be subordinated in rank.

"That the said sum of \$20,000 shall be exclusively used for the cultivation of the crop of 1885 on said Terre Haute plantation. That Lehman, Abraham & Co. shall not foreclose their mortgage against James W. Godberry, passed before N. B. Trist, notary, in January, 1884, during this present year. That no means shall be taken to foreclose, during the present year, the said mortgage on behalf of said interdict. That the crop, as received, shall be first imputed to any advance made during its shipment. That the mortgage shall secure any ultimate balance, up to \$20,000, which may exist after imputation of the crop to the advances. That the curator of the interdict is authorized to intervene in and sign act with the above and foregoing stipulations."

The proceedings of the family meeting were duly approved and homologated, and the act of mortgage executed, conformably thereto. The curator of the interdict intervened and consented to the stipulated postponement.

Under this contract plaintiffs made advances to the defendant, on open account, prior to the 1st of October, 1885, to the amount of \$16,424.44; and the same were subsequently increased, during the season, to \$54,800.

In June, 1885, plaintiffs sued to judgment their account of 1884, which was secured by their mortgage of that year, and the mortgaged property was sent to sale under it, and that of Stockmeyer; but an insufficient sum was realized to satisfy both demands.

During the pendency of these proceedings the intervenor acquired the Stockmeyer mortgaged notes, with full subrogation to the rights of the interdict.

From the proceeds of the 1885 crop there was enough realized to pay the whole of plaintiffs' advances, and leave a surplus of \$790, which was withdrawn by the defendant in January, 1886.

Intervenor's theory and contention is that plaintiffs advanced money to the defendant for purposes and objects foreign to, and in no manner connected with, the cultivation of the crop of 1885, and illegally and unjustly charged same to the proceeds thereof, to his injury and detriment; and that the sum thus advanced and charged exceeds \$8,000, which should have been applied to their 1884 account and mortgage; and that, in this manner, his mortgage would have been promoted,

pro tanto, in pursuance of the tenor and spirit of the recommendations of the family meeting and the expectation of the parties.

He insists that the advances to be made under the act of mortgage were to have been *exclusively used* for the purpose of cultivating the defendant's Terre Haute plantation; that the plaintiffs were specially charged with the duty of seeing that the money they advanced was thus applied; and that, to their knowledge, said sum of \$8,000 was not so applied, and, for that reason, their distributive share of the proceeds of sale should be reduced accordingly.

The evidence shows it to have been the purpose and expectation of the parties that the \$20,000 was to be the limit for the advances plaintiffs were to make, during the cultivation of defendant's crop, and antecedent to the commencement of the rolling season, the date of which was indicated as the 1st of October, 1885. And that from that date until the crop was marketed the amount was not limited. In addition to the security of mortgage the defendant consented a lien, and right of pledge in favor of plaintiffs, on all his 1885 crop, to secure the payment of the *whole* debt for advances; and there is a special clause in the mortgage which provides that same "shall secure any ultimate balance up to \$20,000, which may exist after the imputation of the crop to advances" This stipulation was intended to secure by the mortgage any deficit there might be in the crop pledged.

Undeniably it was the purpose and expectation of the family meeting that defendant should negotiate a loan from plaintiffs of \$20,000, to be exclusively used in the cultivation of his crop prior to the 1st of October, 1885; and that, subsequent to that date, defendant was to obtain additional advances—unlimited in amount—on the faith of his pledge of the crop.

The question is, at whose request and for whose benefit was this arrangement consummated?

Most certainly, that of Godberry and Stockmeyer; and why? What was the position of the parties when the negotiations were initiated in the spring of 1885? The plaintiffs held a first mortgage on Terre Haute plantation for \$23,000, and were disinclined to permit defendant to increase his indebtedness to them. He owed the Stockmeyer mortgage of \$60,000, and could not raise the means to cultivate his plantation. Stockmeyer, curator, was quite apprehensive that the place would not be cultivated, and that plaintiff would enforce their mortgage, then past due, and his security be thereby impaired, if not sacrificed.

He yielded a reluctant consent to the further postponement of his

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mortgage to a new one in favor of the plaintiff, securing future advances to the defendant, in the hope that a surplus large enough would be yielded by the venture, when applied to their first mortgage, to satisfy it, and his own would be advanced to the first in rank.

The negotiations were begun and perfected by and between Stockmeyer, curator, and Godberry, plaintiffs merely stipulating the terms and conditions.

When the notes and mortgage were executed, and the rank of the Stockmeyer mortgage postponed thereto, the plaintiffs discounted the defendant's notes and placed the proceeds to his credit. Beyond this they did nothing other than disburse them on his orders. The proceedings of the family meeting formed no part of the act of mortgage. Their only effect was to authorize the curator of the interdict to postpone the rank of his mortgage. Plaintiffs' contract and obligations are to be found in the act of mortgage exclusively. When they paid money out of the fund to his credit, they had and could exercise no further control over same.

They were powerless to control its *use* or destination.

The covenant contained in the *proces verbal* of the family meeting's proceedings that the money should be "exclusively *used* in the cultivation of the crop," was, necessarily, one between defendant and intervenor, inasmuch as the former was the *sole* recipient and beneficiary, and he was left free to draw at will. He was the only one entitled to *use* this fund standing to his credit with the plaintiffs. He had the exclusive charge of his Terre Haute plantation, and the cultivation thereof. Plaintiffs were, in no sense, the defendant's or intervenor's agents in the matter. The relations between the plaintiffs and defendant were those of lender and borrower, *quoad* the discount of the \$20,000; but, in regard to the advances plaintiffs were to make, subsequent to the 1st of October, 1885, their relations were those of factor and customer. The situation would be quite different if this were a controversy between plaintiffs and intervenor as to which is entitled to preference on the proceeds of the crop of 1885, by reason of their conflicting privileges thereon. But the intervenor has no lien, or privilege on them, and claims none. He simply contends that plaintiffs had none, and illegally charged to them the moneys they improperly advanced defendant, and to which he would have been entitled.

He insists that plaintiffs should have desisted from making the advances complained of, and retained their value in money for his account.

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But, under the contract, was it in plaintiffs' power to have retained any part of the fund resulting from the discount of the defendant's notes, or the proceeds of his crop? If either or both were free from the mortgage and pledge of plaintiffs, were they not subject to the absolute control and destination of the defendant, quite as much as the balance of \$790 he drew in January, 1886? They were in no way subject to the Stockmeyer mortgage. There was no imputation of payment made in the act of mortgage, or proceedings of the family meeting.

There was nothing to have hindered defendant from imputing to plaintiffs' account, a part, or the whole of any such sum as they might have thus retained. It would have been out of the intervenor's power to have subjected such surplus to their demands, except by garnishment or seizure.

The defendant having drawn the money from plaintiffs, and closed his account with them by receipting for the balance of \$790 that was to his credit on the transactions of the year, imputed same to his 1885 indebtedness to them, and placed it beyond the control of the intervenor. If Godberry violated any moral, or legal obligation in so doing, the intervenor must look to him for the reparation of the loss he has sustained and not to the plaintiffs.

There is nothing in the act of mortgage which imposed on plaintiffs the duty to see that the money advanced was "exclusively used for the cultivation" of Terre Haute plantation; and nothing which prevented the defendant from paying them out of the proceeds of his crop.

Plaintiffs are demanding nothing under the contract of 1885. It subserved the purpose of postponing sale of the plantation and enabled the defendant to make the experiment of another crop. The intervenor's expectations were not fulfilled, the defendant's crop being insufficient to discharge, in any part, plaintiffs' mortgage of 1884.

This is the only loss he has sustained thereby.

At this time the situation of the parties is precisely the same as it was when the \$20,000 mortgage was executed. The fatal injury was inflicted by the *first* postponement of the Stockmeyer & Co. mortgage. It was, in its maimed condition, transmitted to the interdict, and the intervenor acquired same with full knowledge.

For the loss he may have suffered, if any, he has no recourse against the plaintiffs.

Judgment affirmed.

Coal Company vs. Sheriff, etc.

No. 10,130.

PITTSBURG AND SOUTHERN COAL COMPANY VS. J. W. BATES,
SHERIFF, ETC.

Goods sent from one State to another are not lawful objects of taxation while they are in *transit* between the place of origin and the place of destination.

Goods thus sent cease to be in *transit* and can be subjected to taxation the moment they reach their place of destination and are there offered for sale, provided they are taxed as other goods are and not by reason of their being brought into the State from another State and are not subjected to any unfavorable discrimination.

It is immaterial whether they are unloaded or not, or were not consigned to any specially authorized agent within the State of destination. It is enough that they were in the charge and custody of one who had the power to sell, who disposed of the same in part and is ready to do so for the rest.

Taxation in such cases, in the absence of contrary congressional legislation, does not violate Art. 1, Sec. 8, Clause 3; Art. 1, Sec. 10, Clause 2, or Art. 4, Sec. 2, Clause 1 of the Constitution of the United States.

A PPEAL from the Seventeenth District Court, Parish of East
Baton Rouge. *Burgess, J.*

W. S. Benedict, Read & Goodale and *H. C. Cage* for Plaintiff and
Appellant.

M. J. Cunningham, Attorney General, and *L. D. Beale*, District
Attorney, for Defendant and Appellee :

1. The tax is levied under the provisions of Act No. 98 of the Legislature of 1886. The coal on which the tax is imposed was brought from the State of Pennsylvania. The tax is a uniform one of six mills on the assessed value of all property within the State, whether owned by the citizens of this or of other States, or aliens, regardless where the property was produced.
2. "Coal brought from Pennsylvania to New Orleans for sale can legally be taxed by the State of Louisiana, and the tax thus levied upon it is not obnoxious to any of the three constitutional principles invoked in this case, viz :
 - "1st. That the citizens of each State shall be entitled to all the immunities and privileges of citizens of the several States.
 - "2d. That Congress shall have power to regulate commerce with foreign powers and among the several States.
 - "3d. That no State shall levy any imposts or duties on imports or exports." 33 Ann. 843; 104 U. S. 622.
3. The constitutional guarantee that the citizens of each State shall be entitled to all the privileges and immunities of the citizens of the several States simply prohibits any injurious discrimination against the products of other States or the rights of their citizens. 8th Wallace, 140 and 152. The tax imposed bears alike upon all the property within this State, no matter who may be the owner or where it is produced, and does not discriminate against the products of other States, or the property of citizens of other States.
4. The property taxed is not in transit, but is on consignment for sale in Louisiana, and mingled with the mass of the property of the State, and taxable as all other property.
5. The terms exports and imports in the constitutional provision invoked have reference

Coal Company vs. Sheriff, etc.

to goods brought from or carried to foreign countries alone, and not to goods carried from one State to another. 33 Ann. 843; 114 U. S. 622.

6. The taxation in question does not in any way infringe upon the constitutional provision relating to the regulation of commerce. "A tax on property that may be the subject of commerce under congressional regulations, is not a tax on commerce. Neither is a tax on property which has been the subject of such commerce, where it is taxed only as property, and in common with property within the State." 33 Ann. 845, and authorities cited.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The plaintiff company appeals from a judgment dissolving an injunction obtained by it, prohibiting the defendant as *ex officio* State tax collector from selling a quantity of coal lying in boats at a distance of a few miles from Baton Rouge, in the Mississippi river, to pay taxes alleged to be due the State thereon.

The contention is, that the very law under which the sheriff and tax collector presumes to act exempts the coal from taxation, as property in transit for transportation and not on consignment for sale. Act 98 of 1886, p. 133.

It is urged at the same time that any tax on the coal which is in *transit* would violate the Constitution of the United States in several particulars, and reference is made to Art. 1, Sec. 8, Clause 3; to same article, Sec. 10, Clause 2, and to Art. 4, Sec. 2, Clause 1, and Art. 1, Sec. 9, Clause 5, of that Constitution.

Unnecessary pains have been taken to establish the elementary proposition that goods in transit from one State to another cannot be lawful objects of taxation during their passage or transportation in the State or through the States lying between that of the origin and that of the destination of the goods.

This indisputable doctrine was formally applied by this Court in a kindred case, *Brown vs. Houston*, tax collector, 33 Ann. 843, and further recognized in the recent case of *Simmons Hardware Company vs. McGuire*, sheriff and tax collector, 39 Ann. 848.

The defenses urged in the present case, as far as the law governing it is concerned, were offered and considered in the *Brown-Houston* suit, which was carried by writ of error to the United States Supreme Court.

After an exhaustive examination of the matters involved, that Court, in an elaborate, considerate and well reasoned opinion, held those defenses untenable and affirmed the judgment complained of.

The Court found and declared, that coal mined in Pennsylvania and sent by water to New Orleans, to be sold in open market there, for account of the owners in Pennsylvania, becomes intermingled on

Coal Company vs. Sheriff, etc.

arrival there (New Orleans) with the general property in the State of Louisiana, and is subject to taxation under the general laws of that State; although, it may be, after arrival, sold from the vessel on which the transportation was made and without being landed and for the purpose of being taken out of the country, on a vessel bound to a foreign port.

In a subsequent case, alluding to this ruling, the same Court, through the same learned organ, held that such goods having arrived at their place of destination may be taxed in the State to which they are carried, if taxed in the same manner as other goods and not by reason of their being brought into the State from another State, nor subjected to any unfavorable discrimination. *Coe vs. Errol*, 106 U. S. 527.

A review of the constitutional articles invoked and of the whole jurisprudence on the subject and mature consideration of the recent rulings just mentioned, force upon the mind the irresistible conclusion that by "*goods in transit*" protected from all State and municipal taxation, is meant goods moving from one State to another, although delayed in transportation, and that such goods become lawful objects of such taxation the moment they reach their destination and are there kept ready and offered for sale at any point within the place of destination.

Such, indeed, is the formal announcement of the Supreme Court of the United States in the *Brown-Houston* case, in which the following language occurs:

"It cannot be seriously contended, at least in the absence of any congressional legislation to the contrary, that all goods which are the product of other States are to be free from taxation in the State to which they may be carried for use, or sale." Page 633.

Looking now into the facts of this case, it appears that the coal in question was sent down the Mississippi river to supply the Louisiana trade; that it reached its destination and was there offered for sale, and sold in part.

The facts, if true, that the coal was and is kept on board the flats which carried it, was not unloaded, and not consigned at this or that point to any specially authorized agent, are immaterial. It is enough that it was in the charge and custody of one or more persons, who had the power to sell it, and who have disposed of it in part and are ready to do so further.

Judgment affirmed.

Landry et al. vs. Landry et als.

No. 10,119.

AMELIE LANDRY ET AL. VS. JOSEPH AND CHRISTOPHER LANDRY
ET ALS.

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114	823

In an action by forced heirs to annul a sale by their ancestor to one of their co-heirs of an immovable for a stipulated price for cash, parol evidence is admissible to show that the real consideration of the conveyance was the obligation undertaken by the heir to support the aged ancestor and his wife during their natural lives. Such an obligation is in law a sufficient consideration for the conveyance.

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124	446

Such a contract is really a donation *inter vivos* with an onerous condition, and such a donation can never be reduced below the expenses incurred by the donee to perform the charges.

A PPEAL from the Twenty-third District Court, Parish of Iberville.
Talbot, J.

C. P. Moore and Alex. Hébert for Plaintiffs and Appellants:

Heirs may contest the simulated sale of the ancestor. C. C. 2444.

Heirs in case of simulation are third parties. Acts 1884, p. 12; 4 Ann. 500; 11 Ann. 227.

In simulation plaintiff need only show that the title is a mask, and he interested in removing it. 11 Ann. 168.

Burden of proof is on he who claims under the deed. 12 R. 95.

Every act is full of proof of itself. C. C. 2236, 2276; 7 N. S. 202; 8 M. 206; 23 Ann. 589.

Parties cannot question their own acts. 4 M. 199; 4 R. 290; 5 R. 200; 2 Ann. 481; 3 Ann. 280; 11 R. 275.

Parol evidence not admissible against written instruments, except to show want of consent through fraud, error or violence. 11 R. 275.

Conditions of the act cannot be altered by parol. 2 La. 446.

Simulation, being a nullity, cannot be ratified. 4 R. 204; 8 Ann. 432; 15 Ann. 572; 39 Ann. 102.

Ratification cannot effect the rights of third parties. C. C. 2272; 11 Ann. 98.

Prescription cannot be founded upon a nullity. 4 R. 201; 8 Ann. 432; 15 Ann. 572; 39 Ann. 102.

Good faith necessary to support prescription. C. C. 3478, 3452; 31 Ann. 653.

Donor cannot divest himself of all his property. C. C. 1497; 11 R. 302.

Possessor in bad faith must pay rent. 33 Ann. 1174 and cases there cited.

Samuel Matthews for Defendants and Appellees.

The opinion of the Court was delivered by

POCHE, J. The purpose of this suit is to annul a sale of an immovable made by Mathurin Landry, plaintiff's grandfather, to his sons, the defendants herein, in April, 1867.

The conveyance is assailed as a simulation, in which no price was paid, and the action is mainly predicated on the provisions of Article 2444 of the Civil Code, which reads as follows:

"The sales of immovable property made by parents to their children may be attacked by the forced heirs, as containing a donation in disguise, if the latter can prove that no price has been paid, or that

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the price was below one-fourth of the real value of the immovable sold at the time of the sale."

The defense is substantially that the true consideration of the transfer was the obligation undertaken by the defendants to provide for the maintenance and support, during the balance of their lives, of their aged father and mother, who were then helpless and unable to support themselves, owning no property but the tract of land thus disposed of by them; and that in compliance with said obligation they had supported their father for four years, and their mother for thirteen years, to the date of the death of both, expending in the discharge of that obligation more than the amount of the price stipulated in the sale, which was the sum of three thousand five hundred dollars.

Hence they aver that if not good as a sale, said conveyance should be legally viewed and maintained as an onerous donation *inter vivos*, and that as such the donation cannot be reduced below the expenses which they had incurred in performing the charges imposed thereby.

That defense having prevailed in the district court, plaintiffs have appealed.

The first contention made on the trial grew out of plaintiffs' objection to parol testimony offered by defendants to show the alleged true consideration of the disputed conveyance, and turns upon the argument that parol evidence cannot be admitted against or beyond what is contained in the acts. C. C. 2276.

We find no error in the ruling which admitted the proffered testimony. It finds ample support in our jurisprudence and in Art. 1900, Civil Code, which provides that:

"If the cause expressed in the consideration should be one that does not exist, yet the contract cannot be invalidated, if the party can show the existence of a true and sufficient consideration."

The construction which this article has uniformly received at the hands of this Court clearly authorized the admission of parol evidence to prove that by the stipulation of a price paid cash in the sum of \$3500, the parties understood what was to them equivalent thereto, the obligation of the purchasers to support the vendor and his aged wife during their natural lives. *Delabiguarde vs. Municipality*, 3 Ann. 130; *Brown vs. Brown*, 30 Ann. 966.

In the recent case of *Dickson vs. Ford*, Clerk, 38 Ann. 737, we took occasion to make a thorough and extended review of our jurisprudence on this subject, by which we were confirmed in our opinion of the necessity and wisdom of such a rule, and in consequence of which we were induced to make the following reflections:

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"The reason or the philosophy of the rule which, as an exception, flows logically from the very terms of the general rule, is that parol evidence, in such cases, is admitted, not against or beyond what is contained in the acts as a contradiction of the clear recital or legal meaning of the stipulations contained therein, but on the contrary, to give effect to the contract arising therefrom, or to ascertain the true intent of the parties when the same is not clearly expressed or described therein."

"As thus understood and construed, the rule is not amenable to the charge that it tends to destroy or impair the sanctity or binding force of authentic acts, but on the contrary, it tends directly to enhance the validity and efficacy of such acts, by substituting light for darkness, certainty for obscurity, and truth for error."

In that case parol testimony was admitted to show that the consideration of a mortgage purporting to be an indebtedness was really to secure the mortgagee on his signature to a bond furnished by the mortgagor.

The evidence offered by the defendants in the instant case shows that, at a fair estimate, the expenses incurred by them for the support and maintenance, for medical treatment in their last illness, and for the burial of their aged parents, exceeded by far the sum of \$3500, stipulated as the purchase price of the property in dispute. Such obligations have been held to be a true and sufficient consideration in law for the conveyance of immovable property. 9 M. 85, Vick vs. Deshantel; 39 Ann. —, Moore et al. vs. Wartelle et als (not yet reported.)

For the purposes of the decree which we propose to render in the cause, it is perhaps immaterial to specially define the contract which is herein assailed. But as precision is always desirable in announcing judicial conclusions, we feel impelled to hold that under the evidence the true nature of the contract was an onerous donation *inter vivos*, and that the evidence is amply sufficient to shield it from plaintiff's attack, even if it had been assailed as a donation. Having been held to be an onerous donation it is protected under the evidence hereinabove stated, by Art. 1514 C. C., which reads:

"Donations, by which charges are imposed on the donee can never be reduced below the expenses which the donee has incurred to perform them."

But in answer to defendants' suggestion that their contract is good as a donation, plaintiffs take the position that, as their ancestor had thereby divested himself of all his property, without reserving enough

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for his subsistence, the donation was null and void *ab initio* under the provisions of Article 1497 of the Civil Code.

But a complete answer to that contention is furnished by Article 1526 of the Code, which reads :

“ In consequence, the rules peculiar to donations *inter vivos* do not apply to onerous and remunerative donations, except when the value of the object given exceeds by one-half that of the charges or of the services.”

As already shown, the charges imposed on the donees in the case in hand exceeded the value of the object given ; hence the attack on this donation was to be characterized by the rules of law applicable to an action for the dissolution of an ordinary commentative and synallagmatic contract, and it should have been preceded by an offer at least to return to the donees the sums disbursed by them in favor of the donor and of his wife as one of the beneficiaries under the onerous donation. The precise point was presented and discussed in the case of Pugh, executor, vs. Cantey, 33 Ann. 786.

In that case the Court ruled as follows :

“ Therefore, as in a suit for the rescission of a contract, in which the plaintiff must put, or offer to put, the defendant in the same position in which he was before the contract, in the case of an onerous donation, the donor or his representative, who seeks the rescission of the donation, must offer to return what he has received from the donee, as a condition precedent of the suit.”

Of course no such offer has been alleged or proven in this case, in which the contention is presented only on appeal.

As far as the record shows, it never occurred to plaintiffs to consider the conveyance as a donation until the suggestion was made by the defendants in their answer. As replications are not allowed under our systems of pleadings, the alleged nullity of the donation must be considered as having been put at issue by the mere allegation of its existence in defendants' answer. Hence the door was open to plaintiffs for proof of any offer which they might have made to defendants as a means of placing themselves legally into line for an attack on the onerous donation.

But this was not attempted, and hence the issue now tendered by plaintiffs is not in the case, and therefore it cannot be considered.

Our conclusion is that the judgment rendered by our learned brother of the district court has done full justice to the parties, and that it should not be disturbed.

Judgment affirmed.

Wirt et al. vs. Pintard.

No. 10,132.

MRS. JULIA A. WIRT ET AL. VS. CLAUDE PINTARD.

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There can be no valid appointment of an administrator unless such appointment is made under the authority of an order therefor, signed either by the judge or the clerk. Letters of administration issued in the absence of such an order are null and void.

A PPEAL from the Fifteenth District Court, Parish of West Feliciana. Yoist, J.

Wickliffe & Fisher for Plaintiffs and Appellants.

W. W. Leake for Defendant and Appellee.

The opinion of the Court was delivered by

TODD, J. The plaintiffs, as collateral heirs of John Marsden Pintard, seek by this action to annul the letters of administration issued to Claude Pintard, the defendant, as administrator of the succession of the deceased.

Among other grounds of nullity urged is this (quoting):

"That there was no order of the judge or clerk authorizing the issuance of the letters of administration."

We find in the record no such order, and this omission was fatal. The appointment was an absolute nullity.

It was so held by the present Court in the case of the succession of Picard, 33 Ann. 1136, a case presenting the precise issue now before us. It is unnecessary for us to report here the reasons which led us to the conclusion stated. They can be found at length in the opinion then delivered, which we re-affirm.

The application for the appointment in question by the defendant was regular, and notice of the application published in the manner and for the time prescribed by law. The conclusion reached by us does not involve the dismissal of the entire proceeding, but only affects the alleged appointment by reason of the omission referred to and which the remanding of the case may enable the parties to supply.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be annulled, avoided and reversed, and it is now adjudged and decreed that the said letters of administration to Claude Pintard, as administrator of the succession of John Marsden Pintard, by the clerk of the district court of the parish of West Feliciana, be annulled and set aside, and the case remanded to the lower court to be proceeded with according to law; defendant to pay costs of both courts.

State vs. Tax Collector et al.

No. 10,141.

THE STATE OF LOUISIANA VS. M. S. POWELL, TAX COLLECTOR ET AL.

Sureties on the bond of an officer cannot avail themselves of laches or omissions of other officers of the State in the performance of duties imposed by law, as a ground of discharge for their own liability.

They cannot plead the ineligibility or disqualification of their principal as a defense.

In a suit against a defaulting tax collector and his sureties, certified extracts from the books of the Auditor of Public Accounts, showing the condition of his account with the State, are competent evidence, and afford *prima facie* proof.

A tax collector is properly charged with the full amount of the tax rolls and licenses, the whole of which he is presumed to have collected, until rebutted by legal vouchers for legal payments or offsets.

The tax collector and his sureties are required by law to make their settlements with the Auditor, and to see that any offsets are duly entered on his books; and if they neglect this duty, they cannot, by parol evidence, contradict the accounts of the Auditor, and claim credits not entered therein.

Sureties are not released because the collections covered by their bond have been paid into the treasury on account of the tax collector for preceding years. Such a disposition was itself as much a misappropriation as if he had devoted it to his private debts.

A power of attorney to bind the constituent "upon any bond whatsoever, either as principal or surety, and to sign the same for her and in her name, either as principal or surety," is such express and special power as is required by Art. 2997 C. C. The term *special* as therein used does not require a designation of the particular act to be done.

A PPEAL from the Eighth District Court, for the Parish of East Carroll. *Deloney, J.*

C. S. Wyly and W. G. Wyly for Plaintiff and Appellant:

1. The sureties of a defaulting tax collector cannot escape liability on the ground that, when they signed the bond, they did so in error, not knowing that such tax collector, qualifying under the commission issued by virtue of his election, was delinquent for collections made under his previous appointment; that, had they known of such default, they would not have signed the bond, and that the Auditor was at fault for not publishing him as a defaulter. 7 Ann. 118, 377; 11 Ann. 549.
2. They cannot set up, as grounds of defense, that their principal was ineligible; that his commission, issued in contravention of a prohibitory law, or a law not allowing a commission to issue to a defaulter; and that the bond they subscribed is invalid. 27 Ann. 568; 7 Ann. 118, 377; 11 Ann. 549; Board of School Directors vs. Judice and others, decided in July, 1887, 39 Ann. p. —.
3. They cannot complain that the Governor improperly issued the commission; they can make no defenses that their principal could not make, except that their right of subrogation against their principal has been impaired by some act of the obligee in such bond. 62 N. Y. 88; 6 L. 518; 33 Ann. 383; 4 N. S. 25; 11 Ann. 643; 27 Ann. 568; 7 Ann. 118, 370, 377; 11 Ann. 149; 33 Ann. 17.
4. The principal and his sureties, having subscribed to the bond while he assumed to act as tax collector under his commission, are estopped from denying that he was tax collector, and they are precluded from disputing their liability on the bond: their liability is fixed, whether the title of the officer be good or bad; they are responsible for his acts while he occupies the office; they cannot dispute the recitals of the bond which they have signed, wherein they covenant and agree to become responsible for the fidelity of

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- their principal. 11 Ann. 643; 27 Ann. 368; 7 Ann. 118, 370; 31 Ann. 738; 36 Ann. 109; 37 Ann. 121; 4 L. 107.
5. The sureties cannot be heard to complain that the moneys for which their principal settled with the Auditor and Treasurer were improperly imputed in such settlement; that the total amount should have been credited as collections on the roll of 1884, and no part thereof should have been applied to previous years. The tax collector made that settlement under oath, as required by law. He could not deny the verity of that settlement, nor can his sureties, who vouched for his fidelity in making proper settlements as well as collections.
 6. If the tax collector makes collections on the roll of one year and applies it in settlement of his delinquency for previous years, such improper application itself is a misappropriation of public moneys, for which his sureties are responsible. 7 Ann. 118, 377.
 7. The Auditor's certified abstracts are admissible in evidence to show the state of public accounts he kept with a delinquent tax collector. The Auditor's books are records of the Executive Department, and are the highest evidence as to the public accounts of the State with her officers. 26 Ann. 268; 31 Ann. 423.
 8. Where there is a delinquency, the sureties of a tax collector are authorized to take possession of the tax lists, and they are required by law to make a final settlement with the Auditor in behalf of such delinquent. Having failed to do so, they are in default, and they cannot be heard to deny the correctness of the Auditor's books. They are estopped from disputing the indebtedness of their principal, as shown in the certified abstracts from the Auditor's books. When sued, they cannot introduce parol evidence to show that the Auditor's books are not correct, and that the defaulter was entitled to credits not entered therein. 33 Ann. 351; 32 Ann. 974; 3 Ann. 631; Act. No. — of Acts of 188, Sec. —.
 9. In making the partial settlements with the Auditor, the delinquent tax collector was aware of the balances owing by him on his different accounts with the Auditor. He made his sworn settlements, showing said balances; he thereby acquiesced in, approved of, and in the most solemn manner admitted his debit balances. He and his sureties are estopped from denying the correctness of said account.
 10. When the sureties offered the receipts of the Treasurer for settlements, made by the defaulting tax collector, they will be precluded from disputing the recitals of those receipts, and from denying that the funds were properly applied, as stated in said receipts.
 11. The tax collector is chargeable with the full amount of the tax rolls, and if he does not settle by a given date, he is *ipso facto* a defaulter. 31 Ann. 738; 3 R. 150; 10 Ann. 695.

F. F. Montgomery and J. W. Montgomery for Defendants and Appellees.

J. M. Kennedy, on same side :

- Where a power of attorney is a formal written instrument, the powers conferred are to be strictly construed. The meaning of general words will be restricted by the context and construed with reference thereto; and
- The authority will be construed strictly, so as to exclude the exercise of any authority not warranted either by the actual terms used, or as a necessary means of executing the authority with effect. *Ewell's Evans on Agency*, p. 205; *Story on Agency* (Bennett's Edition, 1863), pp. 76 and 93.
- General words, and the largest powers, must be construed with reference to the subject matter of the procuration, and the objects to be attained or subserved. They cannot be exercised so as to effect acts which the principal could not be presumed to intend, and which would not promote the apparent ends for which the power was given. They

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must be restricted within the scope and spirit of the instrument, and cannot be invoked as authority foreign to the purposes for which it was given. *Ewell's Evans on Agency*, pp. 208, 209, 211; *Story on Agency*, p. 23, § 83; *Bank of Charleston vs. Hagan*, 2 Ann. 1002; *Copley vs. Flint*, 6 R. 57; *Clay vs. Bynum*, 1 N. S., p. 609; *Gates vs. Bell*, 3 Ann. 62.

The authority of an agent to bind his principal by a contract of suretyship for a stranger, must be express and special. *Gates vs. Bell*, 3 Ann. 62; *State vs. Daspt*, tax collector, et als., 30 Ann. 1112; *Wallace vs. Branch Bank*, 1 Ala. 565; *Kingsley vs. Bank*, 3 Serg. (Tenn.) 107.

"Where the things to be done are not merely acts of administration, the power must be express and special." C. C., Art. 2907; H. D., p. 831, No. 3.

In a suit upon an instrument purporting to be signed not by the defendant personally, but by his representative, the defendant is not bound to admit or deny his signature in his answer. And if it is denied, or not admitted, the plaintiff is bound to prove it as a part of his case. C. C. 2244, 2245; 29 Ann. 546; 1 Ann. 325; 33 Ann. 1313; C. P. 325.

Where no date is proven in a private instrument *de hors* the act itself, it has no date except that at which it is introduced in evidence. 20 Ann. 465; 6 N. S. 132, 332.

White & Saunders, on same side.

The opinion of the Court was delivered by

FENNER, J. M. S. Powell was elected as sheriff and *ex officio* tax collector in 1884, and was commissioned and qualified as such on June 16, 1884, for the full term of four years. In June, 1885, he absconded, and was declared a defaulter to the State and parish for a large amount of taxes not accounted for.

The present action is brought against him and the sureties on his official bond. A separate judgment was rendered against his succession, he having died after suit was instituted, for the amount claimed, without prejudice to the rights and defenses of the sureties, as to whom the case was subsequently tried, resulting in a judgment in their favor.

The sureties, admitting their signatures to the bond, filed a general denial as to all other matters and also certain special defenses.

We will first consider the special defenses, which go to the root of the action, viz :

1. They show that Powell had held the same office during several previous years, having been elected as his own successor; that he had been a defaulter to the State in each of said years; that the law of the State required the Auditor of Public Accounts to publish annually the names of all defaulters; that the Auditor failed to make such publication; that by reason thereof the fact of his previous defalcations was concealed from them, and that they signed the bond through error in ignorance of this fact, which, if they had known, would have prevented them from signing the same.

2. That under Article 171 of the Constitution the said Powell, by reason of his aforesaid defalcation, was ineligible to the office of sheriff, and that, having been elected and commissioned in violation of a constitutional prohibition, the bond is invalid and void.

These defenses are utterly unavailing. It has been so often held that sureties on the bond of an officer cannot avail themselves of laches or omissions of other officers in the performance of duties imposed by law as a ground of discharge of their own liability, and that the ineligibility or disqualification of their principal is no defense, that a mere quotation of the precedents is an all-sufficient disposition of those defenses. Board vs. Judice, 39 Ann. 896; St. Helena vs. Burton, 35 Ann. 521; Board vs. Brown, 33 Ann. 683; State vs. Blohm, 26 Ann. 538; Mayor vs. Merritt, 27 Ann. 568; State vs. Breed, 10 Ann. 491; State vs. Dunn, 11 Ann. 549; State vs. Hayes, 7 Ann. 118; Duncan vs. State, id. 377; Mayor vs. Blache, 6 La. 500.

The case last cited learnedly and scientifically disposes of the defense of error, based on concealment or failure to give notice of prior defalcations.

The State's claim is based upon, and sustained by, certified extracts from the books of the auditor of public accounts. The admissibility and sufficiency of such evidence are disputed by defendants; but it is well settled that they are official records, kept under requirements of law, and as such are admissible and furnish full *prima facie* proof. State vs. Masters, 26 Ann. 268; State vs. McDonnell, 12 Ann. 741.

It is even expressly provided by law that such certified statements shall be held sufficient evidence for the finding of an indictment against a delinquent tax collector and "shall be read in evidence against the accused on the trial of the case." Act No. 107 of 1884, sec. 11.

As to the nature and effect of these statements, the Court has said: "The process of computing debits and credits on a tax collector's account is very simple. He is charged with the sum total of the rolls and of the licenses, and it is for him to offset these by legal vouchers for legal payments and by a delinquent list in due form. The tax collector is presumed to have collected all that is on his roll and his number of licenses, and if he does not settle by a given day, he is a defaulter *ipso facto*. Everything is presumed against him. He is *prima facie* liable for the whole amount of the assessment roll, and the *onus* of proof is upon him to show discharge, payment," etc. Police Jury vs. Brookshier, 31 Ann. 736; State vs. Guilbeau, 37 Ann.

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718; Vermillion vs. Comeau, 10 Ann. 695; Scarborough vs. Stevens, 3 Rob. 147.

The defendants have failed to furnish any legal vouchers whatever to show any offsets.

They set up that in February, 1885, Powell made large payments to the State treasurer, which they claim were made out of moneys collected from the taxes and licenses of 1884, and they produce the treasurer's receipts. These receipts show a certain amount paid on account of taxes and licenses of 1884, which credits are duly entered and allowed in the auditor's certified accounts herein sued on. The balance of the payments are expressly imputed by the receipts themselves to taxes and dues of previous years. How can defendants contradict the receipts offered in evidence by themselves, and of what avail would such contradiction be? The payments so imputed operated a discharge of the dues to which they are imputed, and how can they have the double effect of discharging others to an equal amount?

This Court has expressly held that sureties are not released because the collections covered by their bond have been paid by the sheriff into the treasury on his account for a preceding year.

"The disposition of it alleged by the defendants," says the Court, "was as much a misappropriation as if he had used it in the payment of his private debts." *State vs. Hayes*, 7 Ann. 121.

The defendants further allege that the blank licenses, with which Powell was charged to the amount of \$5592.50, were never used by him, but were turned over by his deputy to his successor in office—I C. Bass—for which sum they claim credit. The only word of evidence in the record with regard to this important allegation is this statement by Bass as a witness: "T. J. Powell was in charge as deputy when I took possession. He turned over to me in blank State licenses for the year 1885, \$5592."

There is nothing to show that this turning over was ever reported to the auditor; that Bass was ever charged with them; what he did with them, whether he disposed of or accounted for them. If they had been returned to the auditor, or charged to Bass, or otherwise accounted for to the State in any manner, the auditor's books would show it, and that was the source to which defendants should have looked for proof that this valid charge against their principal had been legally accounted for. Not only have they failed to bring such proof, but they have not even produced the blank licenses, which, for aught that appears, may have been used and never accounted for to the

State. It was to the State that Powell was bound to account, and he failed to do so. When he absconded, the law provided that "his sureties shall be authorized to take into their hands the list of taxes remaining unpaid and hold the same until his successor is appointed and qualified, when *the sureties shall immediately make a final settlement with the auditor as provided by law.*" Act 119 of 1882, sec. 83. They have failed to make this settlement, and cannot dispute the indebtedness as charged on the auditor's books upon such utterly insufficient evidence.

The same reasons apply to reject their claims to credits on account of taxes collected and property adjudicated to the State for taxes of 1884, by the successor, Bass. There is no proof that the State received any account of these collections from any source, and it is to the State that the account is due.

If it be true that the State recovers by our judgment more than she is entitled to, she is the fountain of justice and defendants may find relief by application to the other departments of her government; but we must hold that they have failed to establish these offsets by any competent evidence.

We find in the record an admission that defendants are entitled to credits on the amount claimed in the sums \$78 and \$65, and shall allow them.

II.

One of the sureties, Mrs. Steinhardt, interposes a denial of her liability on the bond, because her name as surety thereon was signed by an agent without legal authority. The power of attorney, under which the agent acted, is the broadest and most complete that could be imagined. It seems to have been framed to confer upon the agent not only every possible general power, but to confer expressly and specially every power for the exercise of which the Code requires that the authority shall be express and special. One has only to read it with the articles of the Code before him to discover that it was drawn with direct reference thereto and with the plain intention of conferring upon the agent every possible power, in manner and form, as the Code provides.

We make the following extract from the powers granted: "To draw, endorse or accept bills of exchange, promissory notes or bank checks; to bind the said appearer upon or to *any bond, obligation, contract or agreement whatsoever*, either as principal or as surety thereto or thereon, and to sign the same for her and in her name, either as such principal or *surety*, as the case may be."

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Her counsel quotes Copley vs. Flint, 6 Rob. 56. In that case the power granted was to make and endorse notes, drafts, etc., and the Court held that such a power did not include authority to bind the principal as surety to a contract, saying: "An authority to endorse notes or drafts is different from one to bind the constituent as surety *in solido*." Considering that the power to bind as surety is not mentioned among the acts specially noted in C. C. 2997, but is only included under the general final clause thereof, it seems clear that this mandate was drawn especially to meet the ruling in Copley vs. Flint by adding the special power to bind as surety. We have considered all the other authorities quoted, but none of them meet the exigencies of this case.

An express and special power to bind the constituent as surety on "*any bond whatsoever*," is an express and special authority to bind her on this particular bond. The contention that the term *special*, as used in the Code, requires a special authority for each particular act is unreasonable and unsupported by any authority, and would defeat the purposes of mandates, since, if the constituent were required to grant a new authority for each particular act, he might, with less inconvenience, perform the act himself.

If her agent has abused the trust confided in him, she, being *sui juris*, deliberately invested him with the power, and it is just that she should bear the loss rather than the State, which accepted his action under her express and special mandate.

In framing the decree we shall follow the precedent in Teutonia Bank vs. Wagner, 33 Ann. 732.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed; and it is now adjudged and decreed that the State of Louisiana have and recover judgment against the defendants severally, to wit: Fred G. Bernard, Wm. D. Bell, Nathaniel Houghton, Jason Hamilton, Frank D. Rago, Victor M. Purdy, Oliver M. Cherry, Zachariah Goldenburg, Alfred Lewis, John W. Montgomery, and Mrs. Henrietta Steinhardt, in the sum of \$15,818.92, with five per cent per month interest thereon from September 25, 1885, less any amount that may have been collected under the judgment against the succession of M. S. Powell; the said judgment to be operative against said defendants Bernard, Bell and Houghton up to the sum of \$1000 each and no more; against Hamilton and Rago up to the sum of \$500 each and no more; against Purdy, Cherry, Goldenburg and Lewis up to the sum of \$2000 each and no more; against the said Montgomery up to the sum of \$3000 and no

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more ; and against Mrs. Henrietta Steinhardt up to the sum of \$5000 and no more—with the stipulation that there shall be but one satisfaction of the entire amount due plaintiff, defendants and appellees to pay costs in both courts.

No. 10,140.

THE STATE OF LOUISIANA vs. M. S. POWELL ET AL.

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When, after the evidence in a case is closed and the argument begun, one of the parties discovers new evidence, the effect of which is to furnish a new ground of defense and presents an affidavit of its new discovery and of due diligence, and when it is apparent that it would furnish ground for a new trial, the discretion of the judge in opening the case and permitting a supplemental answer and offering of the evidence under it, will not be interfered with.

Under Art. 69 of the Constitution, the term of an officer appointed by the governor during the recess of the Senate, cannot extend beyond the end of the next ensuing session of the legislature; and where the same name is subsequently sent to the Senate and confirmed and a new commission is issued, the latter is a distinct appointment and requires a new bond.

Sureties for the fidelity of an officer appointed for a limited term are not liable for his defaults beyond the term of the appointment or commission under which the bond was furnished.

Provisions of law authorizing officers to hold over until their successors are appointed and qualified, can only extend the liability of the sureties for such reasonable time as, with due diligence, would enable the successor to be appointed and qualified.

A PPEAL from the Eighth District Court, Parish of East Carroll.
Deloney, J.

C. S. Wyly and W. G. Wyly, for Plaintiff and Appellant.

J. W. Montgomery, J. M. Kennedy and F. F. Montgomery, for Defendants and Appellees.

The opinion of the Court was delivered by

FENNER, J. The action is against the principal and sureties on an official bond of M. S. Powell, as tax collector for the State and parish, executed on May 26, 1880.

Powell having died shortly after the bringing of the suit, his succession was made a party. By a written consent, which fully reserved all the rights and defenses of the sureties, the case went to separate trial against the succession of Powell, resulting in a judgment in favor of the plaintiff.

The sureties filed general and various special defenses upon which trial was begun. After the evidence had been closed and in course of

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the argument, the defendant sureties applied to the court for leave to file a supplementary answer setting forth that M. S. Powell was appointed sheriff and *ex-officio* tax collector during a recess of the Senate, to fill a vacancy, and was commissioned thereunder; that under the terms of the constitution of the State said appointment and commission could not extend beyond the end of the ensuing session of the General Assembly; that the bond sued on was executed under said appointment and commission; that subsequently, at said ensuing session, the Governor nominated the said Powell as such officer for the full unexpired term, and sent said nomination to the Senate, by which body it was duly confirmed, and that thereafter, on the 19th day of December, 1881, a new commission was issued to said M. S. Powell, under which he qualified by taking the oath. The said commission and oath of office were annexed.

The application further set forth that said facts had been discovered on that morning, and were not before known to the defendants; notwithstanding due diligence that they did not make the application for delay, but only to obtain justice.

The judge permitted the answer to be filed and the commission and oath to be received in evidence, over the objection of plaintiff's counsel, who reserved exception to the ruling.

That exception is vehemently pressed in this Court; but we think it has no substantial merit. It was obvious that if the newly-discovered evidence and the defense based thereon had merit, it would be ground for a new trial. What advantage could result to either party from proceeding with a vain trial, which, if terminating adversely to defendants, would certainly have to be reopened in order to let in the newly-discovered evidence?

The diligence and good faith of defendants are not questioned, nor is the truth of the facts presented by them disputed.

On the contrary, we find in the record the following admission: "It is admitted that M. S. Powell was first appointed and commissioned sheriff (*ex-officio* tax collector) to fill a vacancy, during the recess of the Senate, and that the bond sued on in this case was given under said commission."

If plaintiff were surprised by this new issue and evidence, and desired opportunity to furnish any countervailing proof, he would have been undoubtedly entitled to a continuance; but he applied for none, nor is it pretended that any benefit would have been derived from one. We are not disposed to encourage loose practice; but, under the circumstances of this case, we do not feel authorized to interfere with

the large discretion vested in inferior courts in such matters, the exercise of which in the present instance seems to us to have been wise and promotive of the ends of justice and a safe and speedy termination of the controversy between the parties.

For reasons which will be more fully presented in another case (No. 10,141), decided this day, we consider that the original defenses of the defendants have no merit, and the defense above referred to is the only one now requiring examination.

Article 69 of the Constitution provides: "The Governor shall have power to fill vacancies that may happen during the recess of the Senate, in cases not otherwise provided for in this constitution, by granting commissions which shall expire at the end of the next session; but no person who has been nominated for office and rejected, shall be appointed to the same office during the recess of the Senate. The failure of the Governor to send into the Senate the name of any person appointed for office, as herein provided, shall be equivalent to rejection."

Under this article the Governor appointed and commissioned Powell, and the bond sued on was furnished. That commission could not possibly extend beyond the end of the next session of the General Assembly; but having been subsequently nominated and confirmed by the Senate, Powell received a new commission, and took a new oath, under which he continued to exercise the duties of the office until June 16, 1884, but without furnishing a new bond.

The suit in this case is for taxes collected and not accounted for between the date of the bond, May 20, 1880, and June 16, 1884.

The question is whether defendants are liable except for moneys collected during the term of the commission under which the bond was furnished, which was limited to the end of the ensuing session of the legislature, to-wit: December 24, 1881.

The question is by no means new. From the time of Lord Hale it has been presented to courts in every variety of aspect, and it has been held uniformly that sureties for the fidelity of an officer, appointed for a limited term, are not liable for his defaults beyond the term of the appointment or commission under which the bond was furnished; and this is not affected by the fact that the terms of the bond are not so restricted or that the officer continues in office as his own successor without furnishing a new bond.

The first and leading case was that of *Arlington vs. Merricke*, 3 Sand. 403, where one had been appointed as deputy postmaster for the term of six months, and furnished a bond with the broadest possi-

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ble condition that he should faithfully perform "for and during all the time" that he should continue as deputy. He continued beyond the six months, and effort was made to hold him for subsequent defaults; but Lord Hale rejected the claim holding that the sureties only intended to bind themselves for the original term of his appointment. and that, otherwise, they might be held accountable during the whole life of the principal.

A case strikingly similar to the instant one came before the Supreme Court of the United States. Under a provision of the U. S. Statutes, almost identical with Art. 69 of our Constitution, the President was authorized, in the recess of the Senate, to make appointments by granting commissions to expire at the end of the next session. The President so appointed Samuel Reed, who qualified and furnished bond. At the ensuing session the President sent his name to the Senate and after his confirmation issued a new commission, after which he continued in office, but without furnishing a new bond. It was claimed that this was one continuing appointment, the second commission operating only as a continuation of the first; but the Court, through Mr. Justice Story, held otherwise, and that the obligatory force of the bond was confined to acts done while the first commission had a legal continuance and could not go beyond it. *United States vs. Kirpatrick*, 9 Wheat, 720.

We have carefully considered the cases of *Shepherd vs. Haralson*, 16 Ann. 134, and *Kelly vs. Gilly*, 5 Ann. 534, but do not find them in conflict with the foregoing. In the first mentioned case it is expressly stated: "The 48th Article of the Constitution of 1852" (corresponding to Art. 69 of our present Constitution) "on the subject of vacancies, has no application to the case at bar. There was no vacancy in the office at the date of Haralson's recess appointment."

This clearly indicates that the decision was not intended to apply to cases arising under that article.

In the 5th Annual case the Art. 51 of the Constitution of 1845 was not referred to, and the decision was confined to the peculiar case of notaries. The decision was that under the laws regulating that office, "every person appointed a notary is entitled to hold office for four years from the date of his appointment," without reference to the question of vacancies or to the length of the unexpired term of his predecessor.

It would require a very unequivocal precedent to justify us in holding that an appointment and commission, which the Constitution positively says "shall expire at the end of the next session," could be held

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as continuing for a longer term. The argument in the Kirkpatrick case is applicable and unanswerable.

It has been further frequently held that the liability of the surety is not extended by provisions of law to the effect that the officer continues in office until his successor is qualified. It is the duty of the State to appoint his successor and to require him to qualify, and in case he fails to appoint some one who will. It cannot, by neglecting these duties and suffering an incumbent to hold on, prolong the liability of the sureties beyond the term contemplated in their bond. *Mayor vs. Crowell*, 40 N. J. Law, 207; *Mayor vs. Horn*, 2 Harr. Delaware, 190; *Commissioners vs. Greenwood*, 1 Desauss. S. C. 450; *Chelmsford vs. Demarest*, 1 Gray, (Mass.) 1; *Leadley vs. Evans*, 2 Bing. 32; *Liverpool Co. vs. Harpley*, 6 East, 507; *Peppin vs. Cooper*, 2 B. and A. 431; *Bigelow vs. Bridge*, 8 Mass. 275.

The four cases first above cited from New Jersey, Delaware, South Carolina and Massachusetts, examine these questions very closely and dispose of every point made by plaintiff.

Possibly, as held in 40th New Jersey, the liability under the bond might be held to extend to such reasonable period beyond the term of office as would enable a successor, in the exercise of due diligence, to be appointed and qualified. But in this case there was no diligence and no effort whatever to require proper qualification by the furnishing of a new bond.

We, therefore, hold that defendants are only responsible for taxes collected and not accounted for between the dates of May 20, 1880, and December 24, 1881.

The evidence in the case does not enable us to ascertain with certainty the amount so due, and we shall remand the case on that ground.

A special ground of defense is presented by Mrs. Bettie Jenkins, administratrix of the succession of D. C. Jenkins, one of the sureties. The suit was undoubtedly against the succession of Jenkins, but it was alleged that Mrs. Jenkins "was administering the succession as natural tutrix of his minor child," and citation was served on her. She appeared with all the other sureties and joined in the answer. On the trial she offered evidence showing that she had been duly appointed and qualified as administratrix and was not administering as natural tutrix. We think the point has no merit. The suit was against the succession; she was alleged to be administering it; she was actually its administratrix; and having been cited and having

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answered, we think she made the succession a party, with full authority to represent it; and cannot avail herself of a mere misdescription of the title under which she administered, which was not excepted to.

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed, and that the case be remanded to the lower court to be there proceeded with according to law and to the views herein expressed, appellees to pay costs of appeal.

No. 10,011.

EDWARD MORGAN VS. TONY NAGODISH ET ALS.

An action brought under the provisions of a special statute is not necessarily petitory or possessory. It may be *sui generis*.

A suit brought under Act 106 of 1886—it being an act to encourage, protect, regulate and develop the oyster industry in this State—is necessarily predicated on apparent title and possession as owner of the lands, acquired from the State or United States government prior to the passage of the act, by the claimant of the *exclusive* right to use the bayous, lakes, etc., which make into or run through them, for the purpose of *planting* oysters and other shell fish. The terms of said act do not include them within its designation of common property.

If the salt water ascertained to be in a bayou, lake, cove, or inlet adjacent to, or connected with, an arm of the Gulf of Mexico, does not result from an overflow that is occasioned by high tides flooding its banks; but, in the first instance, enters an arm of the gulf, and thence passes into said bayou, lake, etc., and is there combined with fresh water derived from other sources, same cannot be considered as an arm of the sea, nor its banks the seashore.

All that tract of land over which the greatest water-flood extends *itself* is the seashore

"High seas" mean that portion of the sea which washes the *open coast*, and do not include the combined salt and fresh waters which, at high tide, flood the banks of an adjacent bay, bayou or lake.

A PPEAL from the Twenty-fourth District Court, Parish of Plaquemines. *Livaudais, J.*

F. C. Zacharie for Plaintiff and Appellee :

The action here corresponds more nearly to the "petitory" than the "possessory," as it is based on ownership. It closely resembles the action of trespass of the Common Law, or *quare clausum fregit*.—See Burrell and Bouvier's dictionaries; verb. "trespass" and "quare clausum fregit," in which action ownership must be alleged and proved.

The Articles of the Civil Code, on the Seashore, which are identical with the Roman Law, are to be interpreted by the same rules as those of the Code Napoleon. Merlin, tom. 14; verb. *Rivages de la Mer*, p. 115.

Section 2, Act 106 of Louisiana, 1886, gives to the riparian proprietor of banks of streams "the exclusive right to use said body or bodies of water, for planting oysters and other shell fish," and such owner and proprietor has the right to enjoin others from using it, by allowing them two years to remove any oyster beds already planted. Sec. 5, Act 106, 1886.

The right, accorded by special statute, is only a confirmation of that established already

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by the Civil Law, and even if it did not already exist, the State, as a sovereign, has the right to control, regulate, lease, give or grant exclusive use of the oyster fisheries in its navigable waters, to its subjects or citizens, even where such fisheries are natural reefs. 16 Peters, 370, 257, 258, 266; 1 Howard, 103; 3 Howard, 224; 7 Howard, 556; 9 Howard, 636; 15 Howard, 432, 433; 18 Howard, 74, 75; 3 Wall., 726; 6 Wall. 436; 4 Otto, 338, 394; 15 Otto, 491.

E. Howard McCaleb for Defendants and Appellants:

1. A plaintiff cannot maintain an injunction suit forbidding defendants "from landing, going on, camping, planting or bedding oysters on the water front of land, or otherwise trespassing in any manner whatsoever upon" land claimed by him. Such an action is a *nondescript*, neither *petitory* (C. P. Arts. 43, et seq.) nor *possessory* in character—C. P. Art. 49. "Trespass does not lie for taking shell fish between high and low water mark." *Peck vs. Lockwood*, 5 Day, 22.
2. The State cannot confer title upon an individual to the seashore, because it is common property, not susceptible of private ownership. Rev. C. C. 450, 451, 452, 453; 12 L. 324; Institutes of Justinian, Lib. II, Tit. 1, §§ 1, 3, 5; *Celsus* Lib. XV. Dig.; Dig. Lib. 1 Tit. XVI; L. 96; *Jovolenus* Lib. II ex *Cassio*; *Moreau's* and *Charleton's* Partidas, Vol. p. 535 L. 3 and p. 336 L. 4 and 6.
3. The articles of our Code are taken from the Roman law, which differs from the French law, relating to the sea and its shores. Note to Art. 1, Sec. 1, No. 115 of Tit. III *Domat's Civil Law* by *Strahan*, *Cushing's* Ed. The Roman law was framed with reference to the Mediterranean Sea, while the French Ordinances concerning the seashore had in view the Atlantic Ocean. *Merlin* *Ques. de Droit*; *Rivegas de la Mer*.

The opinion of the Court was delivered by

WATKINS, J. The plaintiff claims to be the owner of a tract of eight hundred acres of land by a regular chain of title from the State, with all the rights, privileges and servitudes appertaining thereto, and alleges himself to be in possession thereof. He avers that this property is subject to *tidal overflow*, as shown by the official plan of survey in the State land office; and that patents were issued therefor on the 13th of February, 1878.

He further avers that the several defendants, composing a small colony of Austrian fishermen, are now and have been in the habit of trespassing upon said lands, camping thereon, *bedding and planting oysters*, and committing other and divers acts of trespass, without color of right, or warrant of law, and in disregard of his rights as owner, and against his protest, and from which he has suffered damages to the extent of \$250.

He prayed for and obtained an injunction against them, restraining and prohibiting them from landing or camping on same, and from *planting and bedding oysters* on the water front thereof, and from otherwise trespassing thereon; and he prays judgment perpetuating his injunction.

The defense, as set out in defendant's answer, is fourfold:

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1. That plaintiff is without right to maintain this action and stand in judgment.
2. A general denial.
3. A special denial of his ownership and possession.
4. An averment that they are, and have been for several years, engaged in fishing and *bedding* oysters, at a place known as Bayou Cook, an arm of the Gulf of Mexico, and a part of the seashore, on which they have built cabins for shelter, and have been accustomed to moor their boats and the like; and, that said seashore is common property, not susceptible of private ownership.

I.

On the trial the defendants objected to the introduction of proof of the plaintiffs' title, on the ground that this is a possessory action.

We do not so regard it. It is an action that is *sui generis*, and brought under the provisions of Act 106 of 1886, it being an act to "encourage, protect, regulate and develop the oyster industry in this State," etc.

Section one of that act provides that all "the *beds* of rivers, bayous, creeks, lakes, coves, inlets and seashores bordering on the Gulf of Mexico, and all that part of the Gulf of Mexico within the jurisdiction of this State and not heretofore sold * * * shall continue and remain the property of the State of Louisiana, and may be used as a common by all the people of the State, for the purposes of fishing and taking and catching oysters and other shell fish, subject to the restrictions hereinafter imposed; and no grant, or sale, or conveyance shall hereafter be made by the register of the State land office to any estate, or interest of the State in any *natural* oyster bed, or shoal, whether said bed or shoal shall ebb bare or not."

The provisions of section two are "that if any river, bay, lake, bayou, cove, inlet or pass makes into or runs through the land of any person, and is comprised within the limits of his lawful survey, such person, or other lawful occupant, shall have the *exclusive* right to use said body or bodies of water for planting oysters and other shell fish; but the right of the owners, or occupants of land, on any *other* shores, bays, rivers or bayous within the jurisdiction of the State, shall extend to ordinary low water mark; but it is not intended thereby to deprive them of the privilege extended to *others* by the first section of this act."

From a perusal of the quoted provisions of the statute it is clear that the evidence objected to was competent. This testimony was necessary in order that we may determine whether the lands had been

sold by the State prior to the passage of the law ; whether the *beds* o rivers, bayous, creeks, lakes, coves, inlets and shores thereon may be " used as a common " by the defendants for the purpose of fishing and *taking and catching* oysters and other shell fish ; or, being situated within the limits of plaintiff's property acquired from the State prior to the passage of said law, he is entitled to the *exclusive* right to use said bodies of water thereon " for *planting* oysters and other shell fish."

The judge *a quo* did not err in admitting the testimony.

II.

Defendant's counsel also urged objections in the court below to the introduction of a certificate executed by James L. Lobdell, register of the State land office, which purports to verify as correct the annexed sketch of the lands in controversy, and as " taken from approved maps on file in his office," on the ground that he is incompetent to grant the same.

He further objected to the introduction of a certified copy of a survey made by Rightor and McCullom, surveyors, in 1840, and also of a list of swamp and overflowed lands approved to the State by the United States, accompanied by the certificate of approval of the surveyor general of the State, showing those in question to have been " swamp lands," on the grounds following, viz :

1. That said survey was not made in conformity to act of Congress, approved March 2, 1849.

2. That said surveyors were not authorized to make the said selections.

3. That the certificates are informal and incomplete and inadmissible, and do not establish any fact at issue in this case, and same are not worthy of credence, and not the best evidence.

He further objected to the introduction in evidence of a certified *extract* and plan from the office of the United States surveyor general, on the ground that the register is unauthorized to grant any such certificate—the record or a certified copy thereof being the best evidence.

These several objections having been overruled and the documents admitted, the defendants' counsel reserved bills of exception.

Under the express terms of R. S. Sec. 2930, we are of the opinion that the register was competent to grant said certificate.

The objections made to the certified copy of the survey of swamp lands, and the certificate of approval by the surveyor general, appear

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to us to be technical, and whatever force same may have, go to their effect only.

The objection to the certified *extract* from the surveyor general's office is covered by a familiar rule of practice. There was no necessity for the introduction of the *entire* record, or of a copy of it.

If this were a petitory action, such objections would be of greater force. But, for the purpose of this action, the plaintiff is only required to show an *apparently* valid alienation of this property by the State; and, for this purpose, the objected evidence was properly received and was competent.

III.

The evidence shows that the lands, of which the plaintiff claims ownership and possession, was sold by the State anterior to the enactment of Act 106 of 1886. Hence the beds of the bayous, creeks, lakes, coves and seashores bordering on the Gulf of Mexico, and embraced within the calls of plaintiff's authentic title, may not be used as a common by the defendants, for the purpose of fishing, and taking and catching oysters and other shell fish; but the plaintiff, on the contrary, has the *exclusive* right to use the bays, lakes, bayous, coves, inlets or passes which make into or run through his land, or may be comprised within the limits of his lawful survey for the purpose of *planting* oysters and other shell fish.

The notarial act of sale under which he holds, imports the delivery of possession.

IV.

The remaining question to be considered is whether or not the bayou, creek, cove or lake, denominated Bayou Cook, is an arm of the Gulf of Mexico and a part of the seashore, and, as such, common property, and not susceptible of private ownership.

From the evidence it appears that the property plaintiff acquired from the State, by and through several *mesne* conveyances, is penetrated, and, in part, covered by an inlet or bayou called "Bayou Cook," a "place celebrated for the superior quality of its oysters." On the banks of this bayou, or inlet, the defendants have built cabins on posts driven in the ground, and bedded oysters in the shallow waters near the shore.

Bayou Cook appears to form a connecting link between Bay Bastian, an arm of the Gulf of Mexico, and Bay Adam. The latter is situated a mile or more from Bay Bastian, in the interior, and in close proximity to the Mississippi river, a few miles above the point of its confluence with the gulf. Bayou Cook is of about one mile in length,

two acres in width and twenty feet in depth in the main channel. Some water passes into it from the Mississippi river, through small bayous and an adjacent swamp; and some salt water comes into it, by way of Bay Bastian, from the gulf. This commixture of fresh and salt water is decidedly brackish.

For the most part, the defendants live on the shores of Bayou Cook, and in it they fish, and bed and gather oysters. It is not contended by their counsel that theirs are *natural* oyster beds, but those *they have planted*.

The proof does not show clearly the extent to which the ebb and flow of the tides of the gulf effect these lands on the shores of Bayou Cook, or whether or not the oyster beds of the defendants are, at any time, bared by the ebb tide.

Evidently the salt water found in Bayou Cook does not result from the overflow occasioned by the high tides flooding its banks; it enters Bay Bastian, in the first instance, and thence passes into Bayou Cook. The salt water thus supplied, combined with the accumulation of fresh water derived from the Mississippi river, floods the banks of Bayou Cook and passes into the adjacent marsh, to be returned again to the gulf, when its tide is low.

There is a disagreement between counsel as to the closer applicability of the French or Roman law to this controversy. Defendant's counsel insist that, as the articles of our Civil Code are taken direct from the Roman, the French law and jurisprudence are without application. That, as the compilers of and the commentators on the Roman law and jurisprudence had in view the Mediterranean Sea, while those on the French law and jurisprudence had in view the Atlantic Ocean, the former should prevail in case of a textual difference—the Gulf of Mexico being the American Mediterranean.

Justinian declares that “things common to mankind by the law of nature are the air, running water, the sea, and consequently the shores of the sea.” Lib. II, Tit. 1, par. 1.

“All that tract of land over which the greatest *water flood* extends itself is the seashore.” *Ibid*, par. 3.

“The use of the seashore, as well as of the sea, is also public by the law of nations; and, therefore, any person may *erect a cottage* upon it, to which he may resort to dry his nets and haul them from the water; for the *shores* are not understood to be *property* in any man, but are compared to the sea itself, and to the sand or ground which is under the sea.” *Ibid*, par. 5.

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Domat defines "things common to all" to be "the heaven, the stars, the light, the air, the sea." 1 Domat, Sec. 1, Art. 1, par. 115.

We find in the text no mention of the seashore. Our own Code says, "things which are common are air, running water, the sea and its shores." R. C. C. 450.

It also says the "seashore is that *space of land over which the waters of the sea spread*, in the highest water, during the winter season." R. C. C. 451.

"From the public use of the seashores it follows that every one has a right to build cabins thereon for shelter, and likewise to land there, either to fish or shelter himself from the storm, to moor boats, to dry nets," etc. R. C. C. 452.

The compilers of the Code closely followed the precepts of Justinian.

"*Litus est, quos que maximus fluctus a mari pervenit.*" Celsus, Lib. Dig. 25.

Moreau's and Carlton's Partidas, Vol. 1, p. 335; L. 3, p. 336; Law 4 and 6.

In quite an early case the Supreme Court said: "It has frequently been adjudicated in the English common law courts, since the restraining statutes of Richard II. and Henry IV. were passed, that high seas mean that portion of the sea which washes the *open coast*." 5 Howard, 453, Warring vs. Clarke.

Whether we take the criterion established by our Code or that by Justinian, and apply to either the evidence in this case, we must conclude that Bayou Cook is not an arm of the Gulf of Mexico, and that its banks form no part of the seashore. The salt water ascertained to be in Bayou Cook is not supplied by a "water flood" from the gulf; nor do "the waters of the sea (gulf) spread, in the highest water, during the winter season," *over its banks*.

Quite a different rule applies to the banks of *navigable* rivers and water courses.

"By the laws of nations the use of the banks is as public as the rivers; therefore, all persons are at equal liberty to land their vessels, unload them, and to fasten ropes to trees upon the banks as to navigate upon the river itself; still the banks of the river are the property of those who possess the land adjoining," etc. Justinian, Lib. 2, Tit. 1, par. 4; 1 Domat, Sec. 1, Art. 1, par. 116; R. C. C. 445.

The statute, under the provisions of which this suit is brought, has taken this distinction into consideration. It is restricted, in terms, to that part of the environs of the Gulf of Mexico "within the jurisdic-

McCearley vs. Lemennier.

tion of the State" and then particularizes the rivers, bays, lakes, bayous, coves, inlets and passes which "make into or run through the land of any person," etc.

It fully recognizes the right of all persons to *use in common*, for the purposes of fishing and catching oysters and other shell fish, in any "natural oyster bed or shoal," the *beds* of rivers, bayous, creeks, lakes, coves and seashores.

This is in exact conformity with the precepts of Justinian. Quoting: "Wild beasts, birds, fish, and all animals bred either in the sea, the air, or upon the earth, so soon as they are taken become, by the law of nations, the property of the captor; for natural reason gives to the first occupant that which has no previous owner." Justinian, Lib. 11, Tit. 1, par. 12.

The statute quoted accords to the owner of the land which any river, bay, lake, bayou, cove, inlet or pass "makes into or runs through, * * * the exclusive right to use said body or bodies of water for planting oysters and other shell fish."

This land seems to have been recognized as a part of the public domain, and as such the State sold it to the plaintiffs' vendors. The Legislature has, by very strong implication, recognized the right of property therein as vested in private individuals. The district judge was of the opinion that Bayou Cook was not an arm of the Gulf of Mexico, and that its banks formed no part of the seashore—hence the land in question was not common property, but was susceptible of private ownership, and we are of the same opinion.

As there is no complaint made by appellee of the lower judge's reservation in favor of the defendants, his—

Judgment is affirmed.

Mr. Justice Todd absent.

No. 10,115.

A. J. MCCEARLEY VS. LOUIS LEMENNIER.

In the absence of clear proof of dedication to public use, or of formal assent by the owner, from which the same can be inferred, a road used by the public by the tolerance of the latter for thirty years and even longer, will not be declared a public road.

Section 3668, R. S., which incorporates an act of 1818, defining what roads are public, should be construed with Art. R. C. C. 455, which declares that the use of the banks of navigable rivers or streams is public.

In the instant case, the bayou on which it is claimed that the lands of the defendant front, is not a navigable stream and the road in question is not public.

40	253
108	22
40	253
111	88

 McCearley vs. Lemennier.

A PPEAL from the Ninth District Court, Parish of Tensas.
Young, J.

Steele, Garrett & Dagg for Plaintiff and Appellant.

Luce & Lemle for Defendant and Appellee :

1. The police jury of Concordia parish has plenary, unlimited and exclusive power to make such enactments in regard to roads within the limits of Concordia parish as may be necessary and convenient. Act No. 146 of 1858; 34 Ann. 362; 30 Ann. 1092; Secs. 3364 and 3367, R. S.; 7 Ann. 150; Sec. 62 of General Levee Law of 1829; Bul. and Cnr. 760.
2. The State enforces no system of its own in reference to roads. By Act No. 146 of 1858 and Section 3367, R. S., the regulation of such matters was entrusted to the local authorities. 34 Ann. 363.
3. The road legislation passed by the State in 1818, Sec. 3368, R. S., was erroneously incorporated in the R. S. of 1870, as it had been repealed by Act No. 146 of 1858, relegating this matter to the police juries. 34 Ann. 363.
4. In order therefore to ascertain what are the public roads of Concordia parish, we must look to the "road ordinance" adopted by the police jury in 1859 and not to Sec. 3368, R. S.
5. Section 1 of said ordinance changes Sec. 3068 R. S., by inserting *navigable* before *rivers and bayous*.
6. The road was never dedicated to the public. The mere fact that for thirty or forty years the public was permitted to pass over the road would not, of itself, prove a dedication or constitute the road a *locus publicus*. 37 Ann. 502; 18 La. 206; 19 La. 71; 3 Ann. 282; 26 Ann. 462; 15 Ann. 316; 16 Ann. 404.
7. A dedication of a passage can only be established by a written title or its equivalent as a plot or plan or by parol evidence so conclusive as to amount to documentary evidence. 37 Ann. 502.
8. The Bank of Cut Off Bayou is understood to be that which contains it in its ordinary state of high water. Art. 457, C. C.
9. Cut Off Bayou is not navigable. 13 Ann. 131; Sec. 2743, R. S. No. 13.
10. If Cut Off Bayou is navigable, the public only has a servitude on the road on the bank of same for purposes incident to the nature and navigable character of it and not for all purposes. 12 Ann. 655; Arts. 455, 457, 666 and 753, C. C.
11. The servitude established by Art. 455, C. C., should be strictly construed in favor of the owner of the property to be affected. R. C. C. Art. 753.
12. There is no pretense that McCearley desired to use the road in controversy for any purpose incident to the navigation of Cut Off Bayou.
13. Both Sec. 1 of the ordinance of the police jury and Sec. 3368, R. S., are unconstitutional, null and void, as it deprives one of his property without due process of law, and without a just and adequate compensation first being made. R. C. C., 497; 37 Ann. 504; 7 R. 509; 27 Ann. 204 and Arts. 2626 to 2629, R. C. C.
14. Damages must be established with legal certainty. Statements of items in globe without details will not be sufficient. 11 Ann. 178; 15 Ann. 504; Sedgwick on Damages, p. 633; 21 Ann. 185; 37 Ann. 492.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The record contains a motion to dismiss, of which no other mention need be made than that it presents no merit and is overruled.

The object of this suit is to have a certain road declared *public* and

to recover damages for its obstruction by the defendant, who pretends that it is *private* property.

From an adverse judgment, the plaintiff appeals.

The road, with a bayou known as *Cut Off Bayou*, begins at the public levee on the Mississippi river in the direction of Red river, and runs, more or less, along the side of the bayou several miles, except where it becomes itself a *cut off* through cultivated lands at a distance from the bayou on "Burnstown" plantation, which is now owned by the defendant.

It is claimed that the road through those lands is a public road: *because* it was dedicated as such to the public; *because* it has been used as such by the public for upwards of thirty years, and *because* it was made such by law.

The record is barren of any evidence to show the alleged dedication. *Nemo presumitur donare*.

It contains testimony, however, to show the use by the public during thirty years, but this use, for that length of time and longer by the sufferance or tolerance of the owner, has been declared to be insufficient to convert a private into a public road. *Morgan vs. Lombard*, 26 Ann. 462; *Torres vs. Falgoust*, 37 Ann. 497, and authorities cited,

An attempt was made, which proved unsuccessful, to establish that the police jury had considered and treated this road as a public road. The reverse is, we think, established by the evidence.

By the act of 1818, which now forms part of the R. S. as Sec. No. 3368, it was provided that all roads opened, laid out or appointed by the Legislature or police juries, and all such made by individuals whose lands front rivers or bayous, shall be deemed public roads.

The defendant contends, however, that this law must be construed together with Art. R. C. C., 455, which declares that the use of the banks of navigable rivers or streams is public.

If this is done, and we think it ought to be, the inference is that the law, in its second part, invoked by the plaintiff was designed to apply to such roads only which run along *navigable* streams, bayous, etc.

This is, indeed, the construction placed upon the section in question by the police jury of Concordia parish, as appears by an ordinance passed by it, to carry out the law in 1859, in which it is declared that all roads in the parish laid out, opened, or appointed by the Legislature or the police jury, and made on the front of their respective lands by individuals, when such lands have their fronts on any of the *navigable* rivers or bayous in this State, shall be *public*.

The term "*navigable*" was pronounced as never having been in-

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tended to apply to streams only capable of an imperfect navigation, in times of flood and very high water. Were the mere fact that a steam-boat or flat has been up some distance a stream in high water—a sufficient ground for declaring it *navigable*—every slight depression of the soil in Louisiana would become a *navigable* stream and be opened to rafts and boats and convenience of a few persons, to the total destruction of the planting interest. *Boykin vs Shaffer*, 13 Ann. 131.

On the question of navigability of the bayou, the evidence shows conclusively that no boats or crafts capable of transporting cotton, and not even skiffs, have been known to pass through it, unless possibly, at long intervals, in stages of high water and when the banks were overflowed. The growth of trees has made the bayou such that skiffs or logs can hardly be put through.

The charge that the defendant is estopped from denying that the road is *public*, because he was a member of a police jury which declared it to be such and of a committee of supervision, is unfounded.

Reference to the ordinance alluded to, shows that the defendant was one of a committee to lay out a new road.

Granting that, as such, he caused hands, placed under his direct or indirect control by the parish, to repair the road in question, it does not hence follow that he treated it as a public road.

He no doubt thought that, as the public used the road with his tolerance, it was proper that hands paid by the public should at least then, in an urgency, do some work on it, to keep it in passable condition. This would be sufficient justification.

On the other hand, it appears that, considering that the road in question was not a public road, the plaintiff, with a number of citizens, petitioned the police jury to make it a public road.

It is unnecessary to consider the claim in damages, the case being with the defendant, as was found by the district judge.

Judgment affirmed.

No. 10,081.

JAMES WOOD VS. EMILE DABOVAL.

In an action for the liquidation of a partnership, in which issue has been joined between the parties, as to the sufficiency and correctness of an account furnished to the suing partner by the managing partner, in which a trial has taken place on evidence introduced on the merits of the controversy, and in which the defendant had not filed an exception or even prayed for the dismissal of the suit, a judgment maintaining an exception, and for these reasons dismissing the suit, is not responsive

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to the issues tendered by the pleadings; and such a judgment cannot be reviewed on the merits by the appellate tribunal.

In such a case the judgment will be set aside and the cause remanded for trial on the issues involved in the controversy.

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

W. B. Lancaster for Plaintiff and Appellant.

Sambola & Ducros for Defendant and Appellee.

The opinion of the Court was delivered by

POCHÉ, J. This suit is for the liquidation of a partnership, of which plaintiff was a dormant partner, and which was under the exclusive control and management of the defendant.

The partnership had been formed for one year, to begin on the first of June, 1882.

The relief asked by plaintiff was a detailed and exact account from the defendant of the affairs of said partnership, and for a judgment against the defendant for such amount as might be found to be due to plaintiff after a final and judicial investigation of the accounts of the firm.

After a general denial, and after denying specially that he had the exclusive control of said partnership, defendant averred that he has furnished plaintiff with a full and final account of the transactions of said partnership, and also with a statement of plaintiff's personal account with the firm, both of which went to show a balance of \$42.88 in favor of plaintiff, who received said statements without ever questioning the correctness of either. Alleging that he has frequently offered to pay said balance to plaintiff, defendant embodies in his answer a succinct statement of the account of the partnership, and he concludes with a prayer "for such judgment as the nature of the case may require and the law will permit"

The issue having thus been joined between the parties, as to the correctness of the account rendered by the defendant, with a prayer by both parties for a judgment liquidating the partnership, followed by the introduction of a mass of testimony and of some documentary evidence, bearing on the merits of the controversy, the judicial mind is served with quite a surprise on finding in the record the following judgment, from which plaintiff prosecutes this appeal: "In this exception, submitted for adjudication and for the reasons orally assigned by the court, the law and the evidence being in favor of plaintiff in

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exception, it is ordered that the exception filed herein be maintained and accordingly that plaintiff's suit be dismissed with costs." And the surprise thus experienced grows into amazement at the perusal of the briefs filed here by both parties, who join in a discussion of the entire controversy on its merits, in an appeal from a judgment sustaining an exception, and in a record which contains no exception. In their brief defendant's counsel make this statement: "The judgment of the lower court, which called and treated the defense embodied in the said answer as an exception, dismissed the suit with costs."

But this statement is not borne out by the record, from which it appears that the defendant acknowledged an indebtedness to plaintiff in the sum of \$42.88, without averring a legal tender thereof, and that in his prayer he had not asked for the dismissal of the suit. Hence it is clear that the judgment on appeal is not responsive to any issue tendered by the pleadings. The statement furnished to his co partner by the defendant was either an accounting or it was not, and if a sufficient account, it was either correct or it was not.

If it was a sufficient account, and if correct, the judgment should have been in favor of plaintiff for the balance in his favor acknowledged by the defendant. If the conclusion was that the statement was not a sufficient accounting, or that it was not correct, then a proper judgment, based upon the partnership books and other testimony in the case, should have liquidated the partnership by determining the rights and liabilities of the partners *inter sese*.

But under no event and under no law or judicial precedent was there any room or reason for the judgment rendered in the case.

Under those circumstances we are powerless to review the merits of that judgment, and to decide whether it is intrinsically right or wrong, as the record does not set forth the issue on which it seems to be predicated.

We are left but one alternative, and that is to set it aside and to remand the cause for further proceedings according to law.

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed, and it is ordered that this cause be remanded to the lower court, to be there tried under the issues contained in the pleadings and according to law, the costs of this appeal to be taxed against the defendant, other costs to abide the final determination of the case.

 Cottam & Co. vs. Insurance Company.

No. 10,065.

H. T. COTTAM & CO. VS. MECHANICS AND TRADERS' INSURANCE COMPANY.

Where goods, whilst on the wharf of a steamship company, awaiting shipment on one of the vessels of the company, are burned, the owners of the goods cannot recover for their loss upon a policy of insurance, wherein the goods insured or to be insured are referred to (quoting): "as goods laden or to be laden on board the good ship ———" when the policy contained the further expression (quoting:): "Beginning the adventure upon said goods and merchandise from and immediately following the loading thereof on board of said ship."

This last expression will control as to the time the risk began; the former may be regarded as descriptive of or as designating the stock of goods or merchandise intended to be insured.

A PPEAL from the Civil District Court for the Parish of Orleans.
Houston, J.

Braughn, Buck, Dinkelspiel & Hart for Plaintiffs and Appellants.

Percy Roberts for Defendant and Appellee.

The opinion of the Court was delivered by

TODD, J. This is an action to recover a loss from fire under a policy of insurance.

The cause of action is set forth in the petition as follows:

"That on the 18th day of September, 1883, petitioners entered into an agreement and contract with said insurance company, by which it issued to them what is known as an open marine policy, a copy of which is hereto annexed as part of this petition, which said policy was extended from time to time and was in full force and effect on the 29th day of January, 1887.

"That on the — day of January, 1887, petitioners made application to said insurance company to insure under said open policy certain goods, described in the annexed bill of lading, which application was made on the blanks of the company provided for that purpose, one of which is hereto annexed as part of this petition.

"Now your petitioners further represent that, after said bill of lading had been signed by the agents of the steamship Louisiana, in the city of New York, and while said goods were in the possession of said steamship, for the purpose of being laden thereon, and while on the wharf of the steamship company in the city of New York, they were totally destroyed by fire on the 29th of January, 1887. That said loss was within the terms of said policy, and therefore said company is liable to petitioners for the full value of said property, the aforesaid

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exception, it is ordered that the exception filed herein be maintained and accordingly that plaintiff's suit be dismissed with costs." And the surprise thus experienced grows into amazement at the perusal of the briefs filed here by both parties, who join in a discussion of the entire controversy on its merits, in an appeal from a judgment sustaining an exception, and in a record which contains no exception. In their brief defendant's counsel make this statement: "The judgment of the lower court; which called and treated the defense embodied in the said answer as an exception, dismissed the suit with costs."

But this statement is not borne out by the record, from which it appears that the defendant acknowledged an indebtedness to plaintiff in the sum of \$42.88, without averring a legal tender thereof, and that in his prayer he had not asked for the dismissal of the suit. Hence it is clear that the judgment on appeal is not responsive to any issue tendered by the pleadings. The statement furnished to his co partner by the defendant was either an accounting or it was not, and if a sufficient account, it was either correct or it was not.

If it was a sufficient account, and if correct, the judgment should have been in favor of plaintiff for the balance in his favor acknowledged by the defendant. If the conclusion was that the statement was not a sufficient accounting, or that it was not correct, then a proper judgment, based upon the partnership books and other testimony in the case, should have liquidated the partnership by determining the rights and liabilities of the partners *inter sese*.

But under no event and under no law or judicial precedent was there any room or reason for the judgment rendered in the case.

Under those circumstances we are powerless to review the merits of that judgment, and to decide whether it is intrinsically right or wrong, as the record does not set forth the issue on which it seems to be predicated.

We are left but one alternative, and that is to set it aside and to remand the cause for further proceedings according to law.

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed, and it is ordered that this cause be remanded to the lower court, to be there tried under the issues contained in the pleadings and according to law, the costs of this appeal to be taxed against the defendant, other costs to abide the final determination of the case.

 Cottam & Co. vs. Insurance Company.

No. 10,065.

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This last expression will control as to the time the risk began; the former may be regarded as descriptive of or as designating the stock of goods or merchandise intended to be insured.

A PPEAL from the Civil District Court for the Parish of Orleans.
Houston, J.

Braughn, Buck, Dinkelspiel & Hart for Plaintiffs and Appellants.

Percy Roberts for Defendant and Appellee.

The opinion of the Court was delivered by

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"Now your petitioners further represent that, after said bill of lading had been signed by the agents of the steamship Louisiana, in the city of New York, and while said goods were in the possession of said steamship, for the purpose of being laden thereon, and while on the wharf of the steamship company in the city of New York, they were totally destroyed by fire on the 29th of January, 1887. That said loss was within the terms of said policy, and therefore said company is liable to petitioners for the full value of said property, the aforesaid

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sum of twenty-one hundred dollars. That the steamship Louisiana, upon which said goods were to be shipped, was to have left the city of New York on the — day of January, 1887, and said goods would have been laden thereon for said voyage if it had not been for the aforesaid fire."

There was an exception of no cause of action filed and sustained, and judgment dismissing the suit, from which the plaintiffs appealed.

The controversy turns on the construction of the policy.

One clause of it reads as follows :

"MARINE POLICY.

"The Mechanics and Traders' Insurance Company of New Orleans, by this policy, do insure H. T. Cottam & Co., for account of whom it may concern, lost or not lost, subject to the rates of premium, rules and conditions of the Board of Underwriters of New Orleans, existing at the time of shipment upon all kinds of lawful goods and merchandise, *laden or to be laden*, on board of the good ship ———."

The contention of the plaintiffs is that the words "*laden or to be laden*" embraced not only the goods actually on board the vessel, but likewise goods in the custody of the carrier, though not on board the steamer.

Did this clause stand alone the matter would seem too clear for dispute, and the loss in the manner and under the circumstances stated in the petition would manifestly be covered by the terms of the policy. But there follows another clause in these words :

"Beginning the adventure upon the said goods and merchandise *from and immediately following the loading thereof on board of the said vessel at ———*"

It is this last clause that makes room for controversy. The two clauses, at first blush, would seem to conflict. But is there a real conflict between them ? Can they be reconciled ?

The last clause was evidently intended and used to define the precise time when the risk began.

The words "beginning the adventure" are the equivalent of the expression "risk commencing." And when does it so begin ? In the language of the contract "from and immediately following the loading thereof on board of the said vessel."

If from language so clear and explicit, the true intent of the parties would seem to be that the undertaking of the company—the risk—did not commence until *after* the goods were on board, how are we to dispose of the language in the first part of the policy, above quoted, to

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the effect that the company insures all lawful goods, "laden and to be laden on board the ship?"

The goods intended to be insured were, at that time, purchased. Some of them were already on board of the ship when the policy was signed; some were to be put on board after the signing. These goods already on board and those to be sent on board were *the* goods to be insured. This language does not necessarily indicate *when* the policy was to go into effect, nor the exact time when the risk was to begin, but it may reasonably be inferred, especially when we consider the subsequent expressions relative to the beginning of the undertaking or risk, that the words "laden and to be laden on board" were used to designate the thing or stock of goods to be insured—that is, used in a descriptive sense.

The sole vital question in the case for the determination of the Court is, when did this policy become operative—when did the risk begin?

We think the policy answers that question explicitly, free of all ambiguity, in the words "following the loading of the goods on board of the vessel," i. e. after the goods are on board the ship.

Our conclusion on this point is supported by several adjudications. Notably among others is that of *Gordon & Talbot vs. American Ins. Co.*, 4 Denio, p. 360, substantially a parallel case, as will appear from the following quotations from the decision:

"Declaration on a policy dated October 7, 1841, whereby the plaintiffs were insured, lost or not lost, at and from Canton, to a port of discharge in the United States, upon the freight of all kinds of lawful goods and merchandise, *laden or to be laden* on board the good ship *America*, whereof ——— is master, etc. Beginning the adventure upon the said freight from and immediately following the loading thereof on board of the said vessel at ——— as aforesaid," etc.

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They did not take upon themselves any risk until the goods should be on board the ship; and as there is no averment that any were put on board, the plaintiff cannot recover." See also *Murray vs. Ins. Co.*, 4 Johnson, 449; *Smith & Hall vs. Mobile Navigation and Ins. Co.*, 30 Ala., R. 167.

The plaintiffs' counsel cite as opposed to the authority of the above cases: 10 R. 434; 7 Ann. 235; 17 Fed. Rep. 920; 95 U. S. 30.

All of these cases we have examined and none of them, save the last, directly involve the liability of insurance companies or the con-

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struction of insurance policies, but refer to the responsibilities of common carriers to the shippers under the bills of lading.

In the last case (95 U. S. 30) the main point decided was that "although a written agreement cannot be varied by proof of the circumstances out of which it grew, the circumstances may be resorted to for the purpose of ascertaining the subject-matter of the agreement and the stand point of the parties in relation thereto." As for instance to show that where the policy of insurance contained a clause (quoting): "the risk is to be suspended while the vessel is at Baker's stand loading" the true meaning of the clause and the light of surrounding circumstances was that the risk was to be suspended whilst the vessel was at the place designated for the purpose of being loaded.

That case is not relevant because, in the instant case, no circumstances exist or are suggested calculated to elucidate the contract as to the intent of the parties, and the language of contract in our estimation is clear and explicit and free from all obscurity.

For these reasons, we do not feel authorized to disturb the conclusion reached by the judge of the first instance.

Judgment affirmed.

No. 10,117.

LEON QUEROUZE VS. MRS. A. S. CAPMARTIN AND HUSBAND.

To bind the wife as a public merchant two things are essential—1. that the business be conducted in her name; and 2. that it be separate from that of her husband.

Where the business is conducted in a name which is neither that of husband or wife, and when the plaintiff, in his business correspondence, addressed his letters in such name with the prefix of *Monsieur*, he cannot claim that he supposed the name to designate the wife.

When the husband appears as the head of the business and mainly conducts it, when the licenses are taken out and the contracts executed in his name, and when he is regarded in the community as its head and master, no participation therein by the wife will make her liable.

A PPEAL from the Eleventh District Court, Parish of Natchitoches.
Pierson, J.

J. M. Tucker and F. Michinard for Plaintiff and Appellant.

J. E. Breda for Defendant and Appellee.

The opinion of the Court was delivered by

FENNER, J. The object of this suit is to hold a wife liable for a mercantile account contracted by a concern which did business in the

town of Natchitoches under the name of A. S. Capmartin, on the ground that she contracted said debt as a public merchant.

The name in which the business was conducted is not the name of either the husband or the wife. The husband's name is A. Sallières. The wife's maiden name was Anna Capmartin, and her married name might be Anna Capmartin Sallières, but certainly not Anna Sallières Capmartin, or A. S. Capmartin.

The business was managed by the husband and wife jointly, but mainly by the husband, who did most of the trading and conducted nearly the whole of the correspondence.

The account was kept, the goods invoiced and everything conducted by plaintiff in the name of A. S. Capmartin. Whom did the plaintiff consider to be A. S. Capmartin? A significant circumstance which no explanation and hardly any evidence could overcome is that plaintiff's correspondence is almost universally addressed to "*Monsieur A. S. Capmartin*," and begins "*Mon cher Monsieur*," while the husband's letters were often signed A. Sallières as well as A. S. Capmartin. *Monsieur A. S. Capmartin* means necessarily *monsieur le mari*, not *madame la femme*.

The Code provides "she (the wife) is considered as a public merchant, if she carries on a *separate* trade, but not if she retails only the merchandise belonging to the commerce carried on by her husband." Art. 131.

Marcadé, commenting on like article, 220, of the French Code, says: "The wife is not considered as a public merchant when she merely retails goods engaged in the husband's commerce.

Then it is not she who trades, but her husband, and she is simply his mandatary. Whenever the business is not conducted in the name of the wife, the husband is the master, and she only buys and sells for his account, binding him only and not herself." 1 Marcadé, p. 561.

And Demolombe gives the meaning of the Code to be this: "When the husband himself trades and is personally at the head of the business, the wife's personality disappears. And if she assists her husband, if she stands behind the counter and sells, if even she signs notes or bills, in all this she is held to act only as mandatary of her husband without binding herself." 4 Demolombe, p. 236.

And the French courts so interpret it: "A married woman, whatever part she may take in the business of her husband, cannot, on that account, be held as a public merchant. She is a public merchant only when she conducts a *separate* business." J. P. 1841, 1 219.

To the same effect is our own jurisprudence. *Chauvier vs. Fliége*,

 Schwartz vs. Saiter.

6 Ann. 56; Sarran vs. Ragouffe, 12 Ann. 350; Christensen vs. Stumpff, 16 Ann. 50.

All the above cases presented features similar to this, and in some particulars stronger, against the wife.

The business here was not conducted in the name of the wife, and the correspondence conclusively shows that the named used, although not the name of the husband, was understood to designate the husband. The business was not *separate* from that of the husband in the sense of the law, but he himself conducted it and appeared as its head. The State and parish licenses were taken out in his name, and the evidence shows that the community in which it was carried on regarded and treated him as the merchant. All the contracts for furnishing supplies to farmers or laborers, which was the chief business, were made in the name of A. Sallières.

We have carefully considered the evidence touching the conduct and representations of the wife in her dealings in this city, but we think the whole conduct and management of the business too clearly indicated to plaintiff, the participation in and control of the business by the husband, and that their correspondence too clearly shows that the A. S. Capmartin with whom they dealt was a *monsieur* and not a *madame*, to justify us in holding the wife for a fraud, the commission of which, or intent to commit it, is denied by her under oath. If plaintiff was deceived, it was in the face of facts and circumstances which should have enlightened him and prevented the possibility of deception.

Judgment affirmed.

No. 10,062.

MOSES SCHWARTZ vs. W. S. SAITER.—THE NEW ORLEANS, SPANISH
FORT AND LAKE RAILROAD COMPANY, THIRD OPPONENT.

A contractor's privilege attaches to constructions and works erected on soil that is dedicated to public use.

A lessee is not responsible for losses that are occasioned by fire, without his fault or neglect. Although a purchaser who buys, without qualification, an unexpired lease, assumes the obligations of the lessee, yet he is relievable therefrom if he should be deprived by the lessor of the enjoyment of the lease.

The contractor's privilege attaches to constructions and works that have been erected on the leased premises, under a contract with a lessee, in the place of others that have been destroyed by fire during the term of the lease, without his fault or neglect.

40	264
48	948

40	264
51	1384
51	1386

Schwartz vs. Saiter.

A PPEAL from the Civil District Court for the Parish of Orleans. *Rightor, J.*

Bernard Titche and T. M. Gil for Plaintiff and Appellee :

1. The privilege of the lessor does not prevent the sale of the things subject to his privilege by an ordinary judgment creditor. 27 Ann. 482; 31 Ann. 870; 31 Ann. 865.
 2. The railroad company obtained judgment against Saiter, decreeing the property in question to be Saiter's, subject to its lien; seized and advertised the same as his. They are bound by their judicial averments and actions, and forever estopped from contradicting the terms of their own judgment. 4 Ann. 416; 5 Ann. 18; 26 Ann. 186-7; 27 Ann. 315-16; 14 Ann. 140; 29 Ann. 171, 353; 30 Ann. 1147; 28 Ann. 60-1; 23 Ann. 764.
 3. No stipulation between the company and Saiter, to which Schwartz was not a party, can affect Schwartz's right.
 4. That the insurance money which the company permitted Saiter to collect, and use *pro tanto*, was not sufficient to restore the property destroyed by fire, can vest no right in the company to claim the works constructed by Schwartz.
 5. (a) Questions not raised by the pleadings in the lower court cannot be considered here (C. P. 895), and judgment not prayed for cannot be granted.
(b) Schwartz's judgment against Saiter imports absolute verity and cannot be collaterally attacked. 38 Ann. 812; 36 Ann. 831, 533; 32 Ann. 896.
(c) If considered, the judgment will be found valid.
 6. (a) Plaintiff waived his peremptory exception and plea in bar by not requiring decisions thereon before going to the merits.
(b) If not waived, plaintiff having restrained Schwartz from enjoying the lease, cannot profit by its own wrong.
 7. (a) Though Schwartz cannot sell the soil, he may sell the buildings and works put upon it by him, and
(b) Is entitled to the first privilege upon the proceeds of the sale. 30 Ann. 361; R. C. C., 3249.
 8. The property in dispute is on a public street, or highway, of the city of New Orleans. 2 Ann. 770; 10 Pet. 662; Dillon on Mun. Corp., XVII.
No presumption from mere lapse of time can be made to support a nuisance which is an encroachment on the public right.
No private occupancy for whatever time, and whether adverse or by permission can vest a title inconsistent with that of the city or the public. Dillon Mun. Corp., Sec. 520, 521, and p. 503, note; 3 Pa. (Penrose and Watts), 253; 1 R. I., 250, and authorities cited, in Dillon Mun. Corp., Sec. 531, note.
- The railroad company itself does not assert that the property is on its premises, but on or adjacent to the Spanish Fort grounds.
- The title deeds of plaintiff company make no proof whatever of its ownership of the disputed ground.

Robert Mott and Harry H. Hall for Third Opponent and Appellant.

The opinion of the Court was delivered by

WATKINS, J. This is a third opposition, coupled with an injunction against the sale of certain personal property as that of the judgment debtor.

Schwartz obtained judgment against W. S. Saiter, individually, and as lessee of opponent's property, known as the Spanish Fort, for an

Schwartz vs. Saiter.

amount due on open account for material furnished and by him employed in the construction of certain buildings at or adjacent thereto, which enclose the machinery for operating the electric light; in building certain cisterns, and laying the foundations for the machinery, etc., with recognition of his contractor's and vendor's lien thereon.

A detailed bill is made a part of the petition, and is referred to in the judgment for particulars of description.

This property was seized under execution—and also Saiter's rights under his lease from opponent—and advertised for sale.

The railroad company makes opposition on the following grounds, substantially, viz :

That it had leased the Spanish Fort and railroad property to Saiter for a term of years, expiring on the 31st of December, 1885; and that, at the execution of the lease contract, there were on the premises an electric light boiler, dynamo, pipes, cisterns and other appurtenances, and also a building in which this electric light machinery was contained. That there are now upon the premises similar, if not the same, items of property. That it has a judgment against Saiter for a large balance due on rent, and a lien and privilege on said plant, which primes that of Schwartz.

Subsequently opponent amended its opposition and, in the alternative, asserted ownership of the property and averred Schwartz to be its vendor and warrantor, and that on that account he could not seize it as Saiter's.

It averred that the said lessee had contracted to insure the premises and property leased for its benefit, and restore same in good condition at the expiration of the lease; that the building containing the dynamo and other machinery was destroyed by fire, and the dynamo and machinery injured thereby, and Saiter replaced the building and repaired the machinery; and for the repairs, replacement and materials furnished, the seizing creditor claimed a first lien and privilege, and obtained a judgment therefor when he was not entitled to it. That, at the time he furnished materials and did the work, he knew that it was opponent's property and that Saiter was its lessee and gave it no notice, and did not procure its assent thereto; that his claim is not valid on that account; and said services and materials furnished do not affect the property with a privilege.

It avers that, notwithstanding the electric light machinery, building, etc., are not covered by the judgment, nor included in the sheriff's inventory of property seized, they were included in the seizure and advertisement of sale.

Schwartz vs. Saiter.

The opponent's injunction forbade the sale of all the property that was seized and advertised for sale, except Saiter's unexpired lease, and it was adjudicated to Schwartz for \$125.

At a subsequent stage of the proceedings opponent filed, as a peremptory exception, founded on the law, and as a plea in bar of Schwartz's right to recover on his judgment at all, the following, viz:

That there remains unpaid, on its judgment against Saiter for rent, a balance of \$8,000, in addition to repairs, taxes, licenses and insurance premiums due, and Schwartz became bound for the payment thereof, by virtue of his purchase of Saiter's unexpired lease, one of the obligations of which was the return of the property in like good condition as when received—hence his judgment became extinguished by confusion, he having taken the lessee's place in the contract, which imposed the duty on the latter of replacing the property in the condition it was when entered into.

Schwartz, in his answer, denies that the property replaced in the stead of that which was destroyed by fire is situated within the limits of what is known as Spanish Fort, and the contention of his counsel is that it was erected in a public street, or, in what was denominated as a public street of the city, and, as such, dedicated to public use; and therefore opponent is without right, title or lien in the premises.

Schwartz admits his purchase of Saiter's unexpired lease at sheriff's sale, but avers that he was prevented by opponent's injunction from obtaining possession of the leased premises thereunder during its continuance, and from, in any manner, using or enjoying the same, and claims his exoneration from liability for the obligations of the lessee—whatever they may be—on that account.

I.

It must be borne in mind that the seizure was of *personal* property exclusively, and of Saiter's unexpired lease, which terminated on December 31st, 1885; and that our jurisdiction is restricted, in this character of action, to the property seized and the determination of the rights of the contestants thereto or the proceeds thereof. For this reason it is not our province to decide whether the soil on which the building and electric light plant are situated is a *locus publicus* or not. That question is not, however, a serious one, as our predecessors held that "because the soil, upon which a building is erected, cannot be sold to pay the cost of its erection, it by no means follows that the building itself may not be. The 3249th article of the Civil Code gives the lien 'upon the building *and* upon the lot of ground,' and then proceeds to provide for the case where the lot of ground belongs to an-

Schwartz vs. Saiter.

other than the party having the work done, and when, therefore, it is not alienable in satisfaction of the debt. We think the spirit of this article requires us to recognize the lien on the building." 30 Ann. 361, McKnight vs. Parish of Grant.

The claim made in that case and recognized was for materials furnished and work performed in the construction of a jail that plaintiff had built on a square of ground that had been dedicated to public use.

In that instance the contractor dealt with the police jury, a public corporation, while in this he dealt with the lessee of a private corporation. In the former the building was erected on a public square, while in the latter it is claimed to have been built in a public street.

There is a complete parallel between the two cases. But, if there is not, it is quite evident that both contestants occupy the same attitude with reference to the enforcement of their respective liens on the property; and that the seizing creditor holds such relation to opponent's title as to preclude his questioning his ownership of the property leased to Saiter—Schwartz having been one of the directors and principal stockholders of the company that conveyed it to the opponent, and acted as its agent in negotiating and consummating the sale. Under this state of facts it would violate equity to permit Schwartz to take advantage of any defect in opponent's title, or avail himself of any possible deficit in the quantity of property sold.

II.

With regard to opponent's contention that it was the duty of Saiter, under the contract of lease, to replace, at his own expense, the building and machinery that were destroyed or injured by fire; and that he, as lessee, was without right or power to make a contract with Schwartz for their construction, and bind it therefor, it would seem to be sufficient answer to refer to the following clause in the contract, viz:

"And it is expressly understood and *agreed* that the said party of the second part shall be held liable for any damage or loss of any property of whatsoever description, *excepting only* (that destroyed) *by fire*, the acts of the elements, *vis major*, and reasonable wear and tear." This provision of the contract is in exact conformity with the law, which declares that "the lessee is only liable for the injuries and losses sustained through his own fault." R. C. C. 2721.

"He can only be liable for the destruction occasioned by fire, when it is proved that the same happened either by his own *fault or neglect*, or by that of his family." R. C. C. 2723.

There is no averment in the petitions of opposition that the property of the company was injured or destroyed by fire through Saiter's

Schwartz vs. Saiter.

fault or neglect; and if, as alleged, the insurance was paid him, the inference is that the loss was *not* occasioned by his fault or neglect.

There is no force in the contention that the railroad company should be relieved from responsibility, because the lessee gave it no notice of the loss by fire, and of the necessity of replacing the building and machinery, because of its judicial averments of the loss and injury by fire, without any averment that same were occasioned through the lessee's fault or neglect; and because it makes claim to the property put in the place of that which was lost and injured by fire.

It is a matter of no special importance whether or not Saiter collected and used the insurance money and failed to employ it in the replacement and repair of the lost and damaged property, as the effect of the stipulation of the contract on that subject, must necessarily be confined to the parties and cannot affect Schwartz. The company could have protected its lease by having required the lessee to place the insurance policy, as a pledge, in its possession; and, having failed in this, it must suffer the loss sustained thereby.

III.

The next contention that we shall consider is that raised on the exception and plea in bar.

It is undeniable that the sale of the unexpired term of a lease includes the obligations as well as the rights of the lessee; and that a purchaser, who buys without qualification, obliges himself to discharge his obligations. 37 Ann. 587; 11 Ann. 493; 14 Ann. 213; 17 Ann. 174; 39 Ann. 743, Walker, Syndic, vs. McVean.

But Schwartz alleges that, on the 11th of August, 1885—the day subsequent to the one on which the unexpired term of Saiter's lease was adjudicated to him—the opponent enjoined him from taking possession of said property; that its injunction remained in force until it was perpetuated in January, 1886; that in the meanwhile, the full term of the lease had expired; and that, by the immediate operation and effect of said injunction, he was deprived of the enjoyment of the lease, and must, of necessity, be exonerated from the lessee's obligations.

This assertion is fully borne out by the record. The opponent's injunction precludes its assertion against the purchaser of the implied obligations of the lessee.

IV.

The contention of opponent to the effect that a contractor, who furnishes materials and constructs a building upon leased premises, in pursuance of a contract with a tenant, has no lien or privilege on

Schwartz vs. Salter.

the *property under lease*, is supported by the authorities cited. 18 La. 70, Homan vs. Laurens; 2 R. 66, Sewell vs. Daplessis.

But the 3249th article of the Revised Civil Code contains a provision not found in the corresponding article of the Code of 1825. It is in these words, viz:

"The above named parties, (i. e. architects, contractors, etc.,) shall have a lien and privilege upon the building, improvement or other work erected, etc., * * * * * and if such building, improvement or other work is caused to be erected by a *lessee of the lot of ground*, in that case the privilege shall exist only against the *lease* and shall not affect the *owner*."

We are not aware of any decision of this Court that has ever given an interpretation of this article; but it is reasonable to infer, from the provisions quoted, that the lease contemplated is one of property that is unimproved; that the owner thereof shall not be affected by any construction *subsequently* erected thereon by the lessee, and which was not originally part of the "property under lease;" and that the contractor who erected it has a privilege thereon as an integral part of the "*lease*."

Antecedent to the revision of the Code in 1870, the contractor had no such privilege. It is not awarded against the *lessee*, but against the *lease*. The quoted paragraph declares that it shall not affect the *owner*.

The employment of these terms clearly indicates its purpose and object to be that the *construction* forms a part of the lease, and that the privilege of the contractor attaches to it. In this manner it could be made effective. But should it be held that such a construction or work became the property of the lessor of the lot of ground, free of the contractor's lien, it would be deprived of all force and efficacy, as nothing applicable to it would remain.

There is a provision in the contract of lease to the effect that, at the *termination* of the lease, all *repairs and improvements* made by the lessee shall become the property of the lessor; but that "the *buildings and constructions* put upon the property, shall belong to the lessee," etc.

It is, therefore, obvious that, if the constructions under consideration had been intended or designed to replace those lost and destroyed by fire, the lessee would have a seizable interest in them; hence we must conclude that, inasmuch as the loss by fire was not occasioned by Saiter's fault or neglect, and as he was *not* bound to make their replacement, Schwartz's seizure was justified, and must be maintained to that extent.

Schwartz's judgment covers all the property that is mentioned in the

Schwartz vs. Saiter.

itemized account as having been either constructed or repaired; but we are of the opinion that it should be restricted to the constructions that were erected in replacement of those which were destroyed by fire.

V.

In respect to opponent's contention that his lessor's lien primes that of the contractor, it is only necessary to cite, in answer, the 3267th article of the Code, which declares that the contractor shall be paid "in preference to other privileged debts of the debtor, even funeral charges," etc. R. C. C. 3267.

The contractor's privilege is, therefore, first in rank, *quoad* the new constructions and works, and should be paid from the proceeds of *their* sale in preference to opponent's lessor's lien; but his lien does not attach to the property of the lessor which he repaired or improved under a contract with his tenant.

It is therefore ordered, adjudged and decreed that the judgment appealed from be amended in so far as to reject and disallow the privilege of the seizing creditor for material furnished and work performed, in the *repair* of the "property under lease," and to maintain and perpetuate the opponent's injunction to that extent.

And it is further ordered, adjudged and decreed that in so far as said judgment recognizes and enforces the contractor's lien of the seizing creditor on the new buildings and *other works* erected in the replacement of those which had been destroyed by fire, and which contain the electric light machinery and apparatus, that the opponent's injunction be dissolved and it be affirmed.

The cost of appeal is taxed against the seizing creditor and appellee.

ON APPLICATION FOR REHEARING.

Both appellant and appellee desire a rehearing on some points of minor importance.

Without stating them in detail we will simply say:

1st. That the effect of the judgment of Schwartz against Saiter, both as to the debt and privilege, is confined to those litigants and does not have any bearing or influence on the demands of third opponent.

This is elementary.

2d. A simple perusal of our opinion will disclose the fact that the seizing creditor's, mechanic's and contractor's lien, for materials fur-

Schwartz vs. Saiter.

nished and work performed in making repairs and constructions, was the *principal* question that was discussed therein.

It is difficult to understand how a vendor's lien could be *seriously* asserted against the material contained in a building or the parts thereof, and which have become thus indistinguishable.

3d. It has been settled by numerous decisions—and is not an open question—that an appellant, who succeeds in obtaining an amendment favorable to himself of the judgment appealed from, is entitled to have the cost of appeal taxed against the appellee.

This is true of the instant case.

4th. But the appellant claims that, as it was the plaintiff in third opposition in the court below, and a general judgment went against it therein, from which it has obtained relief in part in this Court, and thus procured the perpetuation of its injunction against the seizure *pro tanto*, it is entitled to have the costs of the court *a qua* taxed against the appellee.

In this view we think its counsel are correct.

It is the rule of law that if the plaintiff recover *any portion* of his demand, he is entitled to cost. Had the judge *a quo* rendered the judgment we have pronounced, it would have carried cost in plaintiff's favor; and as our decree sustains its demands in part and *ab initio*, it must have a like effect.

5th. The further contention of appellant's counsel is that one decree should be supplemented so as to *limit* the portion of Schwartz's judgment that is to be enforced against the property it subjects to his *contractor's* lien.

This is a reasonable and proper request.

Having restricted his seizure and lien to the constructions established in the replacement of those which had been destroyed by fire, the *amount* of Schwartz's demand therefor should be likewise restricted, so that he should receive from the proceeds of sale when made nothing in excess thereof, in case a larger sum should be realized.

But this amount can be easily ascertained from the judgment of the lower court, and Schwartz's account, which forms a part thereof; and hence it is unnecessary that a rehearing should be granted for that purpose.

It is therefore ordered, adjudged and decreed that the following items of indebtedness of W. S. Saiter to and in favor of Moses Schwartz, seizing creditor, shall be collected from the proceeds of the sale made in pursuance of our judgment and decree and no others, viz:

Johnson & Co. vs. Boice & Frellsen.

Building enclosing machinery and one cistern	\$650 00
Roofing and tinner's work	75 00
Building foundation	60 00
Labor in erecting and constructing same	125 00

CR. \$910 00

By amount of value of old dynamo..... 125 00

Amount balance.....\$785 00

It is further ordered, adjudged and decreed that the cost of the lower court be taxed against the seizing creditor and appellee; and that, as thus limited, our former decree remain undisturbed.

Rehearing refused.

No. 10,138.

CHARLES F. JOHNSON & CO., MRS. A. V. WITKOWSKI, SUBROGEE, vs.
BOICE & FRELLSEN,

AND

J. W. FRELLSEN, vs. MRS. A. V. WITKOWSKI AND HUSBAND, AND
SHERIFF.

(Consolidated.)

A husband cannot testify in a case in which his wife has an interest involved.

The transferrer of a judgment who sells all his rights to it and to all suits growing out of it, warrants the *existence* of the debt at the time.

If the judgment has been previously extinguished and was not in existence as a claim at the date of the sale, the vendor is bound to restore the price to the purchaser.

The transfer of a judgment does not bind the judgment debtor, unless it has been notified to him or it is clearly shown that he had knowledge of it.

The mere filing or placing the transfer among the papers of the suit and recording of it in the books of the parish recorder, are not equivalent to the notice required by law, which must bring home to the debtor knowledge of the fact.

A debtor who settles with his creditor previous to notification or knowledge of the transfer is discharged from the debt.

A PPEAL from the Eighth District Court, Parish of East Carroll.
Deloney, J.

W. G. Wily for the Appellant.

J. M. Kennedy and *C. J. & I. S. Boatner* for the Appellee.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The object of the first suit is to revive a judgment, and that of the second is to suspend the execution of that judgment meanwhile.

40	273
100	775
40	273
116	653
117	589

Johnson & Co. vs. Boice & Frellsen.

The ground of resistance by the defendant is that the judgment has been extinguished.

From a judgment refusing to revive and perpetuating the injunction, this appeal is taken.

It appears that the judgment sought to be revived was rendered on notes in favor of C. F. Johnson & Co. It is claimed that subsequently it was transferred by that firm in liquidation by one of its members to Mrs. Witkowski, who, it is alleged, was the owner of the notes.

Since the institution of the present proceedings and joining of issue Mrs. Witkowski has transferred all her rights in and to the judgment to one Herman Wilczinski, who by order of court was substituted to her and permitted to proceed in the prosecution and defense of the two suits.

Frellsen, one of the defendants in the original suit, and who is the plaintiff in injunction proceeding, contends that the alleged transfer of the judgment by Johnson & Co. to Mrs. Witkowski is null for various reasons, and that even were it valid, it is barren of effect because it was not *notified* to him. He therefore concludes that the settlement which, in ignorance of that transfer, he avers to have since made with Johnson & Co., has discharged him from the debt.

On the trial, the ostensible plaintiff by substitution, Witczinski, offered as a witness Simon Witkowski. Objection was made on the ground of his being the husband of Mrs. Witkowski, the first transferee, who had an interest at stake in the suit.

The objection was answered by saying that, as Mrs. Witkowski had ceased to have any interest involved, in consequence of her transfer of her rights in the suit, the opposition was groundless.

The district judge sustained the objection and refused to allow the witness to be heard.

There was no error in the ruling.

Mrs. Witkowski appears to have sold by authentic act to Hermann Wilczinski all her rights in and to the judgment and the two cases for the reviving of the same and for an injunction, above mentioned, and all other suits growing therefrom, etc.

Upon production of this act an order was obtained, as already said, to substitute Wilczinski to Mrs. Witkowski, after issue had been joined in the two cases.

The sale of these rights by Mrs. Witkowski, though the same be unexpressed in the act, implied a warranty of the *existence* of the debt, evidenced by the judgment, although it did not include, as a matter

of course, that of the *solvency* of the debtor, for this has to be specially stipulated. R. C. C. 2646, 2647.

It therefore follows that, as she was a warrantor of the existence of the judgment debt sold to Wilczinski, she had an interest at issue, which existence was denied in the suit to revive. It is manifest that if the ground urged by Frellsen is well taken, viz: that the judgment debt had been extinguished, Mrs. Witkowski, as warrantor of that claim, would be liable for reimbursement to her evicted vendee. R. C. C. 2500 and sec. 9; 2 Ann. 880; 7 Ann. 268; 13 Ann. 336.

This would be the case even if she had known or strongly suspected the insolvency of the debtor at the time of the assignment; for then the law provides that the contract would be rescinded and the assignee compelled to restore the price. R. C. C. 2649.

As Mrs. Witkowski had an interest involved in the litigation consisting in the recognition and maintenance of the debt, the existence of which she had warranted, it is clear that her husband could not be permitted to testify, either for or against her. R. C. C. 2281.

The record contains another bill to testimony affecting the genuineness of Mrs. Witkowski's signature to the transfer to her, but the view which we have taken respecting that instrument renders it useless to pass upon that bill.

The next question to be considered is, whether the judgment sought to be revived and the execution of which is enjoined, was or not extinguished previous to notice or knowledge of the transfer to her.

Frellsen strenuously charges the nullity of the transfer which was apparently made of the judgment by the original plaintiffs to Mrs. Witkowski, and urges in support several grounds, which it is needless to consider.

Admitting that the transfer was truly and legally made, it does not follow that from that fact the settlement which Frellsen claims to have made with those plaintiffs, previous to knowledge, has not discharged him.

The transfer, in order to invalidate that settlement, ought to have been *notified* by the original plaintiff, or at least by the subrogee to the judgment debtor.

The law on the subject formally declares that if *previous* to the notice having been given of the transfer, either by the transferrer or the transferee, the debtor should have made payment to the former, he will be discharged from the debt. R. C. C. 2644.

In answer to this defense Mrs. Witkowski retorts that Frellsen had notice of her title to the judgment at the time of the alleged settle-

Johnson & Co. vs. Boice & Frelsen.

ment by him with Johnson & Co. (March 9, 1878), *because* the act of subrogation to the judgment was and had been on file and in the papers of the suit and also been duly recorded. She alleges no other notice.

Conceding this to be true, it does not follow that the filing and recording are in law equivalent to the *notice* required by the Code, which must consist in something more.

The law does not require any particular form of notice, but it demands that notice be given. The object of the notice is as well for the protection of the transferee as for that of the debtor, in order to prevent an improper payment, thus securing the rights of the transferee to payment and those of the debtor against loss and to a legal discharge, in case of payment or settlement. It matters not in what manner knowledge of the transfer is brought home to the debtor, provided it be *clearly* shown that he knew that his former creditor was divested of his right and that such knowledge was properly conveyed. The notice or knowledge was indispensable. 6 N. S. 286, 297; 17 L. 471; 18 L. 414; 8 R. 259; 9 R. 207; 12 R. 409; 4 Ann. 356; 13 Ann. 384; 14 Ann. 384; 26 Ann. 302.

It has consequently been held that the record of an assignment in the office of a parish judge is not notice sufficient to bind third persons (5 N. S. 181); and that knowledge in the judgment debtors' attorney of record of the assignment of the judgment is not sufficient notice. 9 Ann. 225.

The transfer in question to Mrs. Witkowski purports to have been made on December 27, 1876. It is not claimed or shown that it was in any manner notified to Frelsen, or that he had any knowledge of it previous to the institution of the suit to revive. The consequence of the omission is therefore, under the very terms of the law, that if Frelsen has made any settlement with Johnson & Co., who had obtained against his firm, his partner and himself *in solido* the judgment in question, *before* he had any knowledge of the transfer to Mrs. Witkowski, he has satisfied his debt, and that neither Mrs. Witkowski nor her transferee can obtain a revival of the judgment.

Now the evidence is clear that on March 9, 1878, Frelsen made a settlement with Chas. F. Johnson & Co., by which, in consideration of the amount acknowledged to have been paid, he was discharged by them of *all claims* against him, whether included or not in the account on which the receipt and discharge was signed by P. Prudhomme, the partner who represented with authority the partnership in liquidation in the transaction.

Brewing Company vs. Bœbinger et al.

The objection that Frellsen cannot claim a discharge under Article 2644, R. C. C., because such is obtained only on payment and not at all on compromise, has no force.

A creditor, if he choose, can extinguish part of his claim by remission and accept payment of the debt, as reduced, in full of what it previous was. A part payment discharges as well as a payment in full by consent of parties. R. C. C. 2130.

These views relieve us from passing on the title of Mrs. Witkowski to the notes on which the judgment was obtained, and on the question of her obligation to account for the property originally seized when the suit was brought, and which was released on a bond signed by her as surety.

We therefore conclude that, as the judgment sought to be revived and executed was satisfied and extinguished previous to notice and knowledge of the transfer to Mrs. Witkowski, the finding of the lower court must be maintained.

Judgment affirmed.

No. 10,145.

PEOPLES' BREWING COMPANY VS. JOHN BŒBINGER ET AL.

40	277
46	422
40	277
117	978

961

Under the rules of the Civil District Court an injunction proceeding against the execution of a judgment is filed and treated as part of the suit in which the judgment enjoined was rendered. In such a case, after judgment rendered in the injunction proceeding, where neither appeal requires any bond except for costs, appeals from both judgments may be well taken under one order and one bond fixed by the court. 30 Ann. 801; 36 Ann. 963.

Inaccuracies in an order or bond of appeal in describing the judgments appealed from will not invalidate the appeal if the description contains statements sufficient to identify the judgments referred to.

Defendants were sued to deliver a list containing subscriptions of various parties to 800 shares of the stock of plaintiff corporation of the face value of \$50 per share, and in default of such delivery, for judgment condemning them to pay the value of said list.

Held, that the utmost consequence which the law could attach to defendants' default in non-delivery of the list could not exceed a personal obligation to discharge the liabilities of the subscribers in accordance with the terms of their subscriptions; and that a judgment condemning them to pay \$40,000 cash on such default, where the subscriptions were on terms of credit, and without recognizing or reserving their right to receive the stock subscribed for, is manifestly insupportable.

The foregoing robs the injunction proceedings of all significance.

A PPEAL from the Civil District Court for the Parish of Orleans.
Tissot, J.

Brewing Company vs. Baebinger et al.

Branch K. Miller for Plaintiff and Appellee.

J. Q. A. Fellows for Defendants and Appellants.

MOTION TO DISMISS.

The opinion of the Court was delivered by

FENNER, J. The plaintiff, alleging itself to be a corporation, obtained and confirmed a judgment by default against the defendants condemning them to deliver up certain subscription lists within 24 hours after the judgment should become final, and in default of such delivery within said time, to pay to plaintiff \$40,000, with right to execution for said sum at the expiration of the delay without delivery of the lists. The judgment was signed on December 16, 1887, and on January 7, 1888, *fi. fa.* was issued under which the sheriff was proceeding when arrested by an injunction issued on the petition of defendants.

The petition for injunction denied the corporate existence of plaintiff, and made its alleged president, E. Ehrensing, a party individually, together with the sheriff. In this latter proceeding judgment was rendered dismissing the action and dissolving the injunction.

Under the rules of the Civil District Court, injunction proceedings to enjoin the execution of judgments are "treated as parts of the original suits out of which they arise," and are "docketed and numbered as parts of such suits."

Hence, desiring to appeal from both the original judgment and that in the injunction proceeding, defendants applied for and obtained a single order of appeal from both, directing the furnishing of a single bond fixed at \$250, which was executed, and under these proceedings the appeal is brought up.

Various grounds are assigned for dismissing the appeal, which, however, may be summarized as follows:

1. That the two appeals could not be embraced in one order of appeal or supported by a single bond.

We think the appeals are fully protected by the equitable rule announced in *Succession of Clark*, 30 Ann. 801, and affirmed by the present bench in *Succession of Geddes*, 36 Ann. 963. Under the rules of the Court, both judgments were rendered in the same suit; the two judgments were so closely related to each other that the ends of justice will be advanced by considering them together. The first judgment is appealed from only devolutively, and the second did not condemn the appellants to pay any money or deliver anything.

Therefore, a bond for costs was all required in either case, and as said in Clark's case, "the costs are as fully secured by one bond with sufficient security in a sufficient amount as by any number of bonds."

So far as the distinctness of parties is concerned, it is more apparent than real.

The sheriff is a nominal party without interest and need not be considered.

It is evident that Ehrensing is enjoined as the party representing the original plaintiff in executing the judgment, and the only reason why he is not sued in the capacity of president of the Brewing Company is because defendants expressly deny the corporate existence of said company.

The suggested difficulty of adjusting the costs under one bond for two separate judgments was considered and disposed of in Clark's case. The only effect of separating the appeals would be to increase the costs.

2. It is claimed that both the order and bond of appeal are defective for want of sufficient description of or reference to the judgments appealed from. We have examined the order and bond and find that both give correctly either the date of rendition or the date of signature of each judgment in such manner as fully to identify the judgments referred to. *Pasley vs. McConnell*, recently decided.

The motion to dismiss is, therefore, denied.

ON THE MERITS.

As appears from our opinion on the motion to dismiss this appeal is taken from two judgments, which we shall consider separately.

I.

The substance of the petition, on which the first judgment was rendered, is that the defendants Bœbinger and Auer had obtained subscriptions to the stock of plaintiff company to the amount of 800 shares of the par value of fifty dollars each, and that the list of said subscriptions had been delivered into the possession of plaintiff's secretary; that subsequently said Bœbinger and Auer had obtained possession of said list, through certain false pretenses, and had refused to return the same; that said list was of the value to petitioner of \$40,000, and judgment was asked condemning said defendants to deliver said list within 24 hours from finality of judgment herein, in default of which that they be condemned *in solido* to pay to petitioner the sum of \$40,000. Judgment by default was taken and confirmed according

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to the prayer of the petition. A new trial was applied for and refused, and after the lapse of 24 hours from the signature of the judgment execution was issued against defendants for \$40,000.

We need not go further than to say that the alternative part of the judgment cannot be sustained. The allegations of the petition and the evidence on which the default was confirmed show that the list contained subscriptions by unknown persons to stock of the company to the amount of, say, \$40,000, payable only as the price of 800 shares of the stock of said company, to be delivered to the subscribers on such payment, and payable only partly in cash and partly at certain deferred periods. Manifestly the utmost consequence which the law could attach to the defendants' abstraction and non-delivery of the list could not exceed a personal obligation to discharge the liabilities of the subscribers thereon in accordance with the terms of their subscriptions and the list could not have a greater value to petitioner or to anybody else than would result from such discharge. A judgment condemning them for such a default to pay \$40,000 *cash*, and without even a reservation or recognition of their right to demand and receive a corresponding amount of stock, is certainly unsupported by any consideration of law or equity.

We decide and even express an opinion upon no other question in the case except that the judgment *as* rendered cannot be maintained, not even suggesting whether any other, or what other, judgment might have been rendered. We think the ends of justice require that the judgment should be reversed and the case remanded for further proceedings according to law upon the default taken and without prejudice to the rights of defendants to set the same aside on filing answer.

II.

The foregoing decision robs the injunction proceeding from the judgment in which appeal is also taken, of all significance. We need not consider or disturb it.

It is therefore ordered, adjudged and decreed that the judgment confirming the default rendered on December 2, and signed on December 16, 1887, be and the same is hereby reversed and set aside, and that the case be remanded to the court below for further proceedings on the default taken without prejudice to the rights of defendants to set the same aside on filing answer.

It is further ordered and decreed that the judgment in the injunction proceeding be affirmed—costs of appeal to be divided between appellants and appellee.

Davis vs. Tax Collector et als.

No. 10,124.

A. V. DAVIS vs. T. K. GREEN, TAX COLLECTOR, ET ALS.

Art. 214 of the Constitution of the State of Louisiana is self-acting, in so far as it confers directly upon the levee commissioner, authority to levy a tax of five mills for levee purposes, in their respective districts.

The only legislative action contemplated under Art. 214 of the Constitution is the division of the State into levee districts and to provide for the appointment or election of levee commissioners.

A PPEAL from the Ninth District Court, Parish of Tensas.
Young, J.

J. N. Luce for Plaintiff and Appellant.

Steele, Garrett & Dagg for Defendants and Appellees.

The opinion of the Court was delivered by

TODD, J. The issue in this case is the legality and constitutionality of the five mill district levee tax, for the year 1887, amounting to two hundred and ninety-four dollars and seventy-five cents, levied for said year, on the property of plaintiff, situated in the parish of Concordia. The collection and enforcement of said five mill tax by the tax collector of Concordia were enjoined as being illegal and unconstitutional.

Two alleged levees of said five mill tax, for the year 1887, were made: one by the General Assembly under Section 8 of Act No. 44 of 1886, and one by the board of levee commissioners, for the Fifth Louisiana Levee District, in August, 1887.

The grounds of objection to the levy made by the Legislature are that the Legislature, under Art. 213 and 214, could not levy such tax itself, and that such a levy by the Legislature violated Art. 203 of the Constitution.

The objections to the levy made by the levee board are that there was no legislative act and grant authorizing and empowering the levee commissioners to assess such tax, and that Act 44 of 1886 not only conferred no such authority, not only repealed all that part of Act 33 of 1879, which did confer such authority, but in letter and effect restrained and prohibited such a levy by the levee commissioners. The sheriff and levee board answered, putting plaintiff's petition at issue, prayed that demand of plaintiff be rejected and for dissolution of the injunction. The district judge decided the tax levied by the levee commissioners to be valid and constitutional and dissolved plaintiff's injunction. Plaintiff prosecutes this appeal.

Waiving the consideration of the charge of the illegality of the tax

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levied by the General Assembly and the unconstitutionality of the act referred to, under or by which the tax was levied, if the ground upon which the attack is made against the tax levied by the levee commissioners should prove untenable, there would be no reason to disturb the conclusion reached by the judge of the first instance.

It is sufficient if the tax imposed by either authority be found legal and constitutional. Article 214 of the Constitution reads :

"The General Assembly may divide the State into levee districts and provide for the appointment or election of levee commissioners in said districts, who shall in the method and manner to be provided by law have supervision of the erection, repair and maintenance of levees in said districts, to that effect it may levy a tax not to exceed five mills on the taxable property situated within the alluvial portions of said districts subject to overflow."

It has been judicially determined that the power to levy the tax maintained in this article is strictly conferred on the levee commissioners. Railroad and Steamship Company vs. Cage, sheriff, 34 Ann. 506.

The sole question for determination is, whether a legislative grant or authority is necessary to the exercise of that power by the levee commissioners.

It seems to us that this question was virtually solved by the same decision referred to. This Court, in that case, where the sole issue was the constitutionality or legality of a levee tax, imposed by the levee commissioners, after deciding that such a tax could not constitutionally be levied by the General Assembly, proceeds to say (quoting): "But such a tax could be levied by the levee commissioners and would be equal and uniform throughout their territorial limits."

The same decision, after quoting from Article 214 the words "*to that effect* it may levy a tax not to exceed five mills on taxable property within the alluvial portions of said districts subject to overflow," again proceeds:

"Now to which of the two powers enumerated in the first portion of the article do the words "*to that effect*" apply? Evidently not to the power of the Legislature to divide the State into levee districts, but on the contrary, they must refer to the power of the levee commissioners to build, repair and maintain levees. Hence, we conclude that while the pronoun *it* is inartistically used in the language granting

the taxing power the convention undoubtedly intended to confer the taxing power under Art. 214 directly to the levee commissioners."

It is true that in the case of the tax involved in that decision there was a legislative act (33 of 1879) authorizing the levy by the commissioners, and the act 44 of 1886, referred to in the pleadings, contains no such provisions, but the Court in the same decision in treating of the act of 1879, and article 214 declared substantially that the article was framed with special reference to the act and with the undoubted intention of giving it constitutional effect and vitality and secure its efficiency to the people to be affected thereby.

In the face of such expressions and judicial construction, we attach no significance to the repeal of the act of 1879, and the silence of the act of 1886 touching the authority of the commissioners to levy the tax.

The constitutional grant was all-sufficient and self-operative, and no expression of the legislative will or permission was needed.

If the power to impose this tax was conferred by the Constitution on the levee commissioners it was their right and doubtless their duty to exercise it, and there is therefore no force in the contention that the Legislature in levying the tax directly by statutory enactment virtually prohibited the exercise of such authority by the commissioners.

One of the subjects of paramount importance before the convention that framed the Constitution was that of levees, and the necessity of protection from overflow of the alluvial lands of the State. The efficacy of any system of protection that could be devised would essentially depend upon a prompt and speedy raising of adequate means for the construction and maintenance of the required works. Doubtless it was concluded that it was safer and wiser to confer the power to provide the funds in small bodies from the endangered districts that could seasonably realize the exigency and by prompt action and speedy levies meet it, than to jeopardize the entire system of levee protection by depending exclusively on the precarious and dilatory action of the Legislature, which met once only in two years, for the required means.

For these reasons the judgment of the lower court is affirmed at the costs of the plaintiff in both courts.

Ball et al. vs. Executors.

No. 10,133.

MRS. SARAH J. BALL ET AL. VS. MRS. JULIA M. BALL AND CHARLES
W. BALL, EXECUTORS.

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The will contained the following clauses:

The money collected from my life insurance "will more than pay every debt I owe on earth, and as I desire, leave my property to my heirs, to be equally divided among them according to the laws of the State of Louisiana.

"I leave to my brother, Dr. J. W. Ball, \$2500, and to my sister, M. J. McK., \$1500, which my executors will pay out of the first moneys realized from my estate."

Held, that the insufficiency of the insurance money to pay the debts and the necessity of paying the legacies out of the *property*, furnishes no ground for rejecting the legacies. The expectation and desire expressed in the first clause are entirely subordinated to the command expressed in favor of the special legatees, to whom the testator seems to have desired to give a preference even over creditors by directing their payment out of the *first* moneys realized.

Even if the two clauses were contradictory, the last written would prevail under Art. 1733 Rev. Civil Code.

A PPEAL from the Fifteenth District Court, Parish of West Feliciana.
Yoist, J.

W. W. Leake for Plaintiffs and Appellees.

Wickliffe & Fisher for Defendants and Appellants.

The opinion of the Court was delivered by

FENNER, J. William Ball died leaving a will, of which he appointed the defendants to be executors. They opened his succession, qualified as executors, and made a partial administration of the estate, of which they filed a provisional account which was homologated, but the administration has never been completed and no final account has been rendered.

The will contained the following special bequests: "I leave to my dear brother, Dr. Immer W. Ball, twenty-five hundred, and to my dear sister, Mary J. McKnight, fifteen hundred dollars, which my executors will pay out of the first moneys realized from my estate."

Dr. Immer W. Ball died subsequently to the testator, and the plaintiffs are admitted to be his heirs.

They demand in this action, on appropriate averments, that defendants be ordered to file a full account of their administration within a delay fixed, and, in default thereof, they pray for a judgment against said executors in the amount of the special legacy aforesaid due to their ancestor.

The sole defense is, in substance, that under a proper construction of the will, the legacy aforesaid is not due and payable.

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This contention is based on the clauses of the will. The testator left several policies of life insurance in the hands of creditors as security for debts due them, which he mentions, and then proceeds as follows: "I have two policies of \$5000 each in the Massachusetts Mutual Life Insurance Company, made payable to my executors. This, together with the four others, making in all \$50,000, were made for the benefit of my creditors, in order that my real estate and personal property should go to my family clear of incumbrances or debt of any kind, and if these policies are all paid, of which I have no doubt, they will more than pay every debt I owe on earth, and, as I desire, leave my property to my heirs, to be equally divided among them according to the laws of the State of Louisiana."

This is immediately followed by the special bequests heretofore quoted.

Now defendants show that all the assets of the succession have been consumed in the payment of debts except the real estate and personal property attached thereto, and they claim that the heirs are entitled to hold this property free from contribution to the special legacies aforesaid.

It is doubtless true that the testator expected that his insurance money would pay all his debts and perhaps leave a surplus to be applied to the special legacies; but his error in this respect cannot modify the positive disposition in favor of the legatees, to whom, indeed, he seems to have desired to give a preference even over creditors by directing his executors to pay them "out of the *first* moneys realized from my estate."

Even if there were inconsistency between the two clauses quoted, Art. 1723 of the Civil Code would give effect to the one containing the special legacies as being the last written. But there is no inconsistency; the desire and expectation expressed as to result of the liquidation of his estate, are entirely subordinate to the positive command to pay the special legacies. We are not at liberty to conjecture what would have been his wish on this subject if he had foreseen the actual result of this liquidation. We must take his will as he has written it. *Cum in verbis nulla ambiguitas est, non debet admitti voluntatis questio.*

The legatee, Dr. Immer W. Ball, never made any renunciation, express or implied, of his right under the will, and his mere failure to demand payment during his life-time cannot operate to deprive his heirs of their legal rights.

Judgment affirmed.

 Denis vs. Gayle et al.

No. 10,116.

CHARLES A. DENIS vs. A. C. GAYLE ET AL.

The action of a creditor to have a judgment recognizing a homestead in favor of his judgment debtor, declared inoperative and void, for the reason that the conditions which were the motive of the judgment, have ceased to exist, must not be confounded with the action for the nullity of a judgment as provided in Section 3, chapter 5 of the Code of Practice.

Such an action rests on the principle that if anything should happen to destroy the force of a judgment, it will cease to have effect either against the parties or their heirs.

The debtor who claims a homestead under Act 52 of 1865 must combine in him at least three conditions: he must own the property, he must occupy it as a residence, and he must have a family dependent upon him for support. A judgment declaring a property as his homestead on those conditions will cease to have effect as soon as the conditions, or any one of them, cease to exist.

On proper showing such a judgment will be declared inoperative and avoided.

As soon as the judgment becomes inoperative, the judicial mortgages which had been properly inscribed against the owner of the property, recognized as his homestead, and which were dormant, become executory against the property even in the hands of a third possessor by virtue of a sale from the original owner.

The owner of a property exempt from seizure as his homestead cannot sell such property free of the mortgages inscribed against it before the sale. He has the legal right to sell the property, but it passes to the purchaser burdened with the judicial mortgages duly inscribed against the vendor.

A PPEAL from the Fifteenth District Court, Parish of Pointe Coupee.
Yoist, J.

Thos. H. Hewes for Plaintiff and Appellee.

W. W. Leake for Defendants and Appellants:

A judgment, affirmed on appeal, recognizing a homestead right under Sec. 1691 *et seq.* R. S., constitutes *res judicata*. 35 Ann. 332, 917; 37 Ann. 223.

The district court cannot annul a judgment of the Supreme Court. 37 Ann. 341; 2 La. 9.

To the action of nullity none can be parties except those who were parties to the judgment sought to be annulled. 15 Ann. 273.

To annul a definitive judgment, plaintiff must allege that it has been obtained through fraud, or other ill-practices. C. P. 607.

The action to annul a judgment is prescribed by one year. 32 Ann. 409; 31 Ann. 467; 29 Ann. 106; 28 Ann. 578.

A mortgage on property exempt under the homestead act cannot be enforced; and the owner of such property may sell the same, free from the mortgage he has imposed on it. 29 Ann. 330.

The opinion of the Court was delivered by

POCH, J. The main question presented for discussion in this case is to determine whether the owner of an immovable which has been judicially recognized as his homestead under the act of 1865 (Revised Statutes of 1870, Section 1691,) can sell such property free of judicial

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mortgages duly inscribed against him in the parish wherein the property is situated.

Plaintiff, as the transferee of two judgments rendered against the defendant Gayle, seeks to enforce the judicial mortgage resulting therefrom against a tract of land and improvements thereon, now owned by the other defendant, J. L. Kingsbury, under a sale made to him in February, 1883, by Gayle, which property had been judicially declared to be exempt from seizure, as the latter's homestead in the suit entitled Ben Gerson & Son vs. A. C. Gayle, Wheeler and Pierson intervenors, reported in the 34th of Annuals, p. 337.

The relief which he prays for is a decree declaring that by reason, and as an effect, of the sale made by Gayle to Kingsbury, the judgment rendered in the suit above mentioned and reported in the 34th Annual, p. 337, had become inoperative and of no effect, and should, therefore, be avoided, and declaring further that the judicial mortgage resulting from the judgments herein above recited, inscribed before the date of said sale, attaches to and effects said property as having been acquired by Kingsbury subject to said mortgage.

Defendants first pleaded the following exceptions:

1. Want of jurisdiction in the district court to annul a judgment rendered by the Supreme Court.
2. The misjoinder of Kingsbury as a party to this suit, because he was not a party in the judgment sought to be annulled.
3. That the demand for nullity is inconsistent with an action to enforce a judicial mortgage.
4. Want of proper parties, because Ben Gerson and Wheeler and Pierson were necessary parties.
5. No cause of action, because the petition contains no allegation of fraud, error or ill-practice in connection with the judgment sought to be annulled, the correctness of which is not even questioned.
6. The prescription of one year.

Their exceptions having been overruled, defendants filed a general denial, reserving the benefit of their exceptions, and they now appeal from a judgment in favor of plaintiff.

At a glance of the exceptions filed by defendants, it appears that they are predicated on a misapprehension of the true nature of plaintiff's demand, and that they could apply only to an action of nullity under the provisions of Section 3, Article 604 *et seq.* of the Code of practice, for causes existing previous to or contemporaneous with the rendition of the judgment sought to be annulled.

But, as suggested by defendants themselves in their fifth exception,

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the present action involves no charge of fraud, error, ill-practice or other ground of nullity as characterizing the judgment to be herein discussed, at the time that it was rendered, or in any way connected with it at the date of its rendition. Plaintiff does not, in any manner, question the correctness of the judgment in its disposition of the issues then tendered to the Court for solution; hence he does not put at issue the right of Gayle to his homestead as therein recognized under the conditions and circumstances then existing. His contention is simply that the reasons on which the judgment was founded, and from which it derived its vitality, having ceased to exist, the judgment itself having exhausted and completed its entire mission, has become extinct, without force or effect or life. The issues which he now tenders had no being or existence at the time that the judgment was rendered, hence they were no elements in the consideration of the cause, and therefore the judgment could not be *res adjudicata* as to his present cause of action, which has arisen since the rendition of the judgment, and is entirely disconnected with, or independent of, the state of the case then disposed of.

In the case of Lemunier vs. Mc.Cearley, 37 Ann. 133, which involved the contested custody of a child, and in which the defendant was met with a judgment entrusting her with such custody "temporarily or for the present," as an argument that she was thereby stripped of that right at the date of the case then on trial, this Court said: "The restriction in that judgment, whether right or wrong, could not and did not compel a like restriction in the judgment now before us under different conditions and state of facts, as we have shown, and whilst we may recognize it as *res adjudicata* as to the matters and issues there existing, it can have no legal effect upon those now shown in the instant case. For, as stated, we think there is no cause for any limitation or restrictions over the rights of the defendant touching the care and control of the child."

The same principle came under the consideration of this Court in the case of Davidson vs. the City of New Orleans, 32 Ann. 1248, in which the following conclusions were expressed: "It is easy to conceive, * * * and it is plain, that cases may arise in which causes, occurring subsequently to the rendition of judgments, may render their execution illegal and inequitable and violative of rights not within the contemplation of the Court when the judgment was rendered, and not intended to be foreclosed thereby." And in that opinion plaintiff's right to sue for a decree declaring a judgment previously rendered against her inoperative was recognized.

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On the merits in the same case, reported in 34 Ann. 170, the nature of the cause was held to be "a suit to have that judgment declared inoperative, because of what has occurred since it was pronounced, and which could not have been pleaded *before* it was rendered." And sustaining plaintiff's contention the Court recognized the principle involved in her demand in the following language: "If the parties have appealed from the judgment and it is confirmed by the sentence of a competent superior tribunal, they shall be bound forever by it thereafter; yet if anything should happen to destroy its force, it will cease to have effect, either against the parties or their heirs."

It is on that principle that plaintiff's present action rests and on its strength his suit must be sustained, as unaffected by defendants' exceptions, which were properly overruled. *Calvett vs. Williams*, 35 Ann. 322.

ON THE MERITS.

The facts alleged by plaintiff are fully substantiated by the record, and hence the question to be discussed is purely one of law.

In support of their proposition that under the sale to Kingsbury, Gale's property, which had been judicially recognized as his homestead, passed free of the judicial mortgage resulting from the judgments in favor of Ben Gerson & Son and of Wheeler and Pierson, defendants rely almost exclusively on the decision rendered by our immediate predecessors in the case of *Vanwickle vs. Landry*, 29 Ann. 330. Such was the practical result of that decision. But in the opinion is to be found the following language: "It is conceded that a party, in whose favor a certain quantity of property has been adjudicated as exempt from seizure, may sell the exempted property, and his vendee would acquire a title, unincumbered by the mortgage granted before such adjudication." If, as the terms of the opinion seem strongly to indicate, the conclusion reached by the Court had been conceded by the parties, it is not a violent presumption to consider that the principle did not emanate from the Court, and that the *dictum* is not precisely a judicial precedent.

But be that as it may, the case is liable to just criticism, as having gone far beyond the plain scope of the homestead act of 1865. In another part of the same opinion the following declaration is made and is actually used as a consideration tending to the conclusion adopted by the majority of the Court: "If we cannot decree the enforcement of the mortgage now because of a legal obstacle, if the law

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exempts the property from seizure so unqualifiedly that a mortgage voluntarily imposed on it by the debtor is held not to bind it, and if the exemption is so complete that the owner may convey the property by an unincumbered title, it would seem that no future contingency can revivify a mortgage thus declared extinct."

But a mere reference to the statute is sufficient to show that none of the premises of the proposition can find any sanction in its plain and unambiguous meaning; and that the act contains no language to justify even a suspicion of any legislative intent to impair or affect in any manner the existing laws of Louisiana on the binding force and effect of mortgages, either legal, judicial or conventional.

Hence, the provisions of law which declare that the judicial mortgage which results from the inscription in the proper office of a valid final judgment, takes effect and may be enforced against all the immovables which the debtor actually owns or may subsequently acquire have not been attested or otherwise impaired by the enactment of that statute. Civil Code, Art. 3328.

Its title is an act "To exempt from seizure and sale a homestead and other property," and in its body it purports or attempts to do nothing more.

The homestead which it exempts from seizure and sale is defined to be "one hundred and sixty acres of ground and the buildings and improvements thereon occupied as a residence and *bona fide* owned by the debtor, having a family, or mother or father, or person or persons dependent on him for support."

Under the plainest rules of construction the debtor who claims the exemption must combine in himself four indispensable conditions:

1. He must be the *bona fide* owner of the land.
2. He must occupy the premises as a residence.
3. He must have a family or person or persons dependent on him for support.
4. The property must not exceed in value two thousand dollars.

Numerous adjudications of this Court are authority for the assertion that the absence of any one of those conditions in the debtor will defeat his claim for exemption, and that to entitle him to the homestead all the conditions must co-exist at the very time that the claim is propounded. *Tilton vs. Vignes*, 33 Ann. 240; *Gallagher vs. Payne*, 34 Ann. 1057; *Bossier vs. Sheriff*, 37 Ann. 263.

Hence it follows that if subsequently to the judgment which recognizes the exemption, any one or all of the conditions which were

required to justify its rendition should cease to exist, the right to the homestead must fall.

Under a proper construction of the statute the judgment does not create a homestead, and under it the debtor does not acquire a vested right to the homestead. The judgment must be construed as a declaration of the co-existence of the conditions of the law which authorizes the exemption, and which must be understood as written in the judgment.

In the case of Culvitt vs. Williams, 35 Ann. 324, the Court said: "It is a judgment which the Court, by reason of its *continuing jurisdiction* over the subject matter, can revoke on a proper showing and thus render inoperative. No reservation of the power to that effect was necessary in the original decree. It exists and can be exercised as a matter of course."

Under the authority of our laws on the subject of judicial mortgages the legal effect of the two judgments now owned by plaintiff was a judicial mortgage against Gayle's property, now under discussion, from the moment that they were inscribed in the proper office; and the effect of the judgment which recognized his right to the same as a homestead was to suspend the execution of the judgment against that property, as long as the conditions under which the law granted the exemption continued to exist in fact and in law. The judicial mortgage which resulted from those judgments has the following effects:

1. "That the debtor cannot sell, engage or mortgage the same property to other persons to the prejudice of the mortgage which is already made to another creditor."

2. "That if the mortgaged thing goes out of the debtor's hands, the creditor may follow it in whatever hands it may have passed, in so much that the third possessor of it is obliged to pay the debt for which the thing is mortgaged, or to relinquish it to be sold, that the creditor may be paid out of the proceeds thereof." * * * Civil Code, Art. 3397.

Now, by the sale and delivery of the property to Kingsbury, Gayle became at once stripped of two of the essential conditions under which the property had been judicially declared to be his homestead. He then ceased to *own* it, and also to *occupy* it as a residence; and at that very moment the judicial mortgage which attached to it and which had not been cancelled or in the least impaired by the homestead judgment, followed the property as an incumbrance in the hands of the new owner. At the moment that the exemption ceased, the

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mortgage, which had been only dormant, not extinct, became executory, with all its pristine force and vitality. Having severed all his connections with the property thus sold, Gayle could no longer extend over it a shield of protection in the shape of an exemption from seizure and sale, which was personal to himself.

His rights were then restricted to the proceeds of the sale, and these were not screened from the pursuit of his creditors under his homestead judgment. How then can it be argued that the land which had ceased to be his property could be shielded in the hands of a third person, under the effect of a judgment rendered inoperative by his own acts?

It is thus made manifest that the views expressed in the VanWickle case find no sanction in the fundamental principles of our laws; and an examination of all the subsequent decisions of this Court on the statute now under discussion shows that they all fairly antagonize the spirit of that decision, which can be considered as practically overruled.

The views expressed and the conclusion reached by the Court in the case of Chaffe & Son vs. McGehee & Co., 38 Ann. 278, squarely bear out this assertion and settle our jurisprudence adversely to the doctrine of the case in question.

The homestead law is therein expounded as follows: "Hence the homestead only exists *sub modo*, and * * * a mortgage will bind the debtor's property against everything but homestead rights, and * * * though inoperative as long as the property is subject to the conditions constituting the homestead; it will become operative the moment those conditions cease to exist. Thus, a judicial mortgage, while inoperative against the pre-existing homestead, would unquestionably attach to the property when it ceased to be a homestead." * * * The decision in the case of Hardin vs. Wolf, 29 Ann. 333, which defendants invoke as sustaining the theory of the VanWickle opinion, cannot avail them, because that case was in terms and completely overruled in the decision of Nugent vs. Carruth, 32 Ann. 444, by the same Bench which had rendered both the VanWickle and the Hardin opinions; and thus the doctrine, since uniformly followed, which requires a strict construction of homestead and other exemption laws, was solidly consecrated.

All these considerations lead forcibly to the conclusion, adopted by the lower court, that the judgment which recognized the property now

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in suit, as Gayle's homestead has since become inoperative, and that it should, therefore, be avoided, in so far as plaintiff's judicial mortgage is concerned, and that the property passed to the purchaser burdened with said mortgage.

Judgment affirmed.

DISSENTING OPINION.

TODD, J. Plaintiff is the transferee of two judgments against the defendant Gayle rendered in favor of Ben Gerson & Son and Wheeler & Pierson, respectively, and duly recorded in the mortgage office in the parish of Pointe Coupee, where certain immovable property of the judgment debtor was situated.

Ben Gerson & Son, before the transfer of their judgment to the plaintiff, attempted to enforce it against the said immovable property then in possession of Gayle, the debtor, but by a decree of this Court rendered on appeal, the property in question was declared to be the homestead of Gayle, and as such exempt from seizure. See *Gerson vs. Gayle*, 34 Ann. 337.

Subsequently to this decree Gayle sold the property to Kingsbury, his co-defendant, and by reason of this sale by the judgment debtor, and his removal therefrom, the plaintiff, as the owner of said judgments and subrogee of the judicial mortgages claimed to result from their inscription, seeks by this action to have the said decree of this Court, recognizing Gayle's homestead on the property, declared inoperative and void, and the property now legally subject to the mortgages; and this presents the sole issue for our determination.

In the case of *Van Wickle vs. Landry*, 29 Ann. 330, it was expressly held (quoting):

"That a mortgage on property exempt under the homestead act cannot be enforced; and the owner of such property may sell the same free from the mortgage he has imposed upon it."

In that case the property was declared free from a mortgage that the debtor himself had sought to impose upon it, and where the act of the debtor, in giving the mortgage, might have been reasonably construed as waiving the exemption under the homestead. *A fortiori* would the exemption apply to a mortgage not expressly consented, but resulting from the operation of the law.

If the property was free from the mortgage whilst it was occupied as a homestead, and if it was not inalienable—as was likewise held—

Holz vs. Fishel et al.

it would seem to follow as a logical sequence, that if sold, or when sold, it would be sold and acquired by the purchaser free of mortgages.

This decision has never been overruled. It is, however, claimed that the cases of *Hardin vs. Wolf*, 29 Ann. 333, and *Chaffe & Sons vs. McGehee*, 38 Ann. 278, are opposed to it.

The question determined in the first case mentioned was, whether the rights of homestead or the exemption thereunder could be waived; and whilst it was held that it could not be waived in advance by the debtor, yet we find in one of the concurring opinions delivered, it was expressly held that the property subject to it could be sold.

In the other case (*Chaffe vs. McGehee*) the debtor had abandoned the homestead and moved out of the State, but the title to the property still remained in him. It had never been sold or disposed of, and under these circumstances it was held that it was subject to seizure. This was a material condition which distinguished it from the instant case.

The question involved in the present litigation has, in my opinion, been settled, and settled adversely to the plaintiff.

Holding these views, I therefore dissent.

No. 10,114.

JOSEPH HOLZ VS LOUIS FISHEL ET AL.

EDWARD C. PALMER VS. THOMAS DUFFY, SHERIFF, ET AL.

(Consolidated.)

An order granting to an appellant additional delay for filing his transcript after the return day, inadvertently, in contravention of the rule of the Code of Practice (Art. 383), will be rescinded by the Supreme Court on its own motion, and cannot save the appeal.

Such an order, obtained on the fourth judicial day after the return day, is an absolute nullity. In making motions for extension of the return day, appellants must be careful to be within the plain requisites of the law, or else they will eventually be deprived of any relief granted inadvertently.

A proceeding filed by the appellant in the appellate tribunal on the last day of grace, stating the cause not under his control by which he was prevented from filing his transcript in time, but which contains no prayer for an extension, cannot avail him.

A PPEAL from the Civil District Court for the Parish of Orleans.
Voorhies, J.

Singleton, Browne & Choate for the Appellees.

F. Michinard for the Appellants.

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MOTION TO DISMISS.

The opinion of the Court was delivered by

POCHE, J. The ground of the motion is that the transcript was filed too late.

The appeal was returnable on the 16th of January last, and the transcript was not filed before the 15th of February following; But appellant relies on an order of this Court, rendered on January 20th, extending the return day, thirty days from that date.

Appellee makes the point that the application for delay was itself made too late, and that the order granted thereon was inadvertently and wrongfully issued.

From the minutes, it appears that this Court was in session on the 16th, 17th, 18th and 19th of January, and thence it is clear that under the provisions of Article 883 of the Code of Practice, the application for an extension of the return day should have been made at the latest on the 19th.

But in answer to that position, appellant contends that he is protected by certain proceedings which he filed in this Court on that day.

In those proceedings he alleged that the clerk of the lower court had failed, when called upon, to deliver to him a transcript of appeal in the case, or to furnish him with a certificate of the reasons which had prevented him from completing the transcript. Whereupon he prayed for writs of *certiorari* and *mandamus* on the clerk for relief in connection with the transcript, or for the required certificate, and for a writ of prohibition, intended to restrain the execution of the judgment during the pendency of his proceedings.

For reasons unnecessary to mention here, his counsel concluded not to press his proceedings for the writs above stated, and on the next day he filed his motion for delay, accompanied by a proper certificate from the clerk of the lower court. In his proceedings, filed on the 19th of January, appellant's counsel did not pray for an extension of the return day, and such an application was not made before the following day, the 20th of January.

The question presented for discussion is, therefore, to determine whether the proceedings filed by appellant on the 19th of January can avail him to save his appeal under the provisions of Article 883 of the Code of Practice.

The rule is as follows: "If the appellant has not filed in the Supreme Court, on the day appointed by the inferior judge, the record from the court below, and was prevented from doing so by any event

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not under his control, he may, either in person or by attorney, apply to the court, before the expiration of three days, * * * and demand a further time to bring it up, which may be granted by the court if the event causing the delay be proved to its satisfaction."

This is a rule of law from which the Court cannot depart, and by which it is stripped of all discretion in the premises. No other showing can be made, and no other proceeding can be invoked to follow the path thus clearly indicated.

Hence this Court has uniformly enforced the rule according to its plain and unambiguous import and meaning. *Vancampen vs. Morris*, 6 Rob. 79; *Brickell et al vs. Conner et al*, 10 Ann. 235; *Farmers, etc., vs. Strawbridge*, 24 Ann. 126; *Redmoud vs. Mann*, 23 Ann. 373.

In the case of *Rhea vs. Steamer Simonds*, 15 Ann. 712, the transcript was filed on the fourth judicial day after the return day, and that was held too late, and the appeal was dismissed.

This is precisely the case here, as to the application for delay, and hence this appeal must share the same fate, unless it be saved by the proceedings of January the 19th.

As herein above stated, those proceedings did not contain a prayer for, and were therefore not followed by, an order of extension of the return day, and hence they must be held as nought under the requirements of the rule as established by the Code and as construed in our jurisprudence.

Section 3 of Rule 3 of this Court reads: "Motions for extension of time to file the transcripts must be supported by affidavit of the clerk of the lower court, or of counsel, or of the mover."

Hence it follows that the certificate of the clerk, which the latter was alleged to have refused him, was not the exclusive support which appellant needed for an application for delay.

By means of his proceedings, appellant informed the court of the cause, not under his control, by which he had been prevented from bringing up his appeal in time, but he failed, or omitted to pray for the only relief which could avail him under the provisions of the Code. Under the plain requirements of the rule, and in keeping with judicial construction of the same, it is clear that even the order of this Court granting the writs prayed for could not have been construed as a prayer for and an extension of time.

A similar conclusion would follow, if the prayer of appellant, that his affidavit and his motion predicated thereon, be taken in lieu of the transcript, had been granted. Nothing but an extension of time can be substituted for the transcript.

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A similar excuse was made by the appellant in the case of DeBouchel vs. Husband, 34 Ann. 102, in which an application for an extension of time had been made and an order therefor obtained, after the expiration of the three days of grace. His excuse was that the District Judge had, by an *ex parte* order, illegally dismissed his appeal, which he had succeeded to re-establish only after the expiration of the three judicial days. The excuse was undoubtedly more weighty than the reasons relied upon by appellant in this case, but in obedience to the strict mandate of the law the court said:

"The appellant was in fault, and he must bear the consequences."

"Whatever has been the action of the District Court, it was the duty of the appellant to have procured the transcript required by law, if possible, and to have seasonably filed it in this Court; or, he should, at least before the expiration of the delay, within which he should have filed the transcript, have made a proper showing here, for an extension of time to bring up the transcript. He has done neither," and the appeal was dismissed. Lacroix vs. Bonin, 33 Ann. 119.

In the case of Pierce vs. Cushing, 33 Ann. 401, the appellant urged that by reason of the voluminous record he had been prevented from having it completed in time, the court answered: "This cannot justify the filing of the record beyond the delays and extensions prescribed therefor. There was a special remedy provided by law for cases of appeals attended with such difficulties, of which the appellant twice or thrice availed himself, and could have done so again by proper application."

By presenting to this Court, on January 20, his formal motion for an extension of thirty days, supported by the required certificate, appellant tacitly admitted, as it is otherwise shown, that his proceedings of the day previous were not intended by himself as an application for additional delay to file his transcript. It is, therefore, inevitable to conclude that he has entirely mistaken his remedy, that the application of January 20 came too late, and that the order for an extension granted thereon must be considered as rescinded, and as null and void. "The court can grant no valid order in contravention of law, and when surprised, as in this case, into an error, . . . will rescind its own orders without special motion to that effect. In making such motions, attorneys must be careful to be within "the plain requisites of the law, or else they will eventually be deprived of any relief which may be granted inadvertently." Chretien vs. Poincy, 33 Ann. 131; Succession of Kuntz, 33 Ann. 30; Exposition vs. Railroad Company, 38 Ann. 905.

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"It is true that an appellate tribunal will always and firmly protect the constitutional right of appeal, but, on the other hand, the court must not lose sight of the legal rights acquired by an appellee through the omission or neglect of his opponent."

Such is the condition of things presented here, and such must be the result.

This appeal is, therefore, dismissed at appellant's costs.

DISSENTING OPINION.

FENNER, J. Holz having taken a suspensive appeal from the judgments in these cases returnable to this Court, appeared here on the last day allowed for return, after this Court had adjourned, and filed an affidavit setting forth the refusal of the clerk of the court to complete the record of the appeal or to give him a certificate showing its non-completion, and with said affidavit filed the following motion: "On motion of F. Michinard, of counsel for Holz, etc., and the accompanying affidavit considered, it is ordered that this motion and affidavit be filed in lieu of the ordinary record, and that said appellant do, without delay, apply for the proper writs to obtain the record required by law."

This motion was not acted on, owing to the court's not being in session, but it is not thereby deprived of any effect to which it is entitled so far as timeliness of action is concerned.

At the same time he filed an application here for writs of mandamus, certiorari and prohibition against the clerk of the lower court, designed to perfect his appeal.

This petition was handed to the Chief Justice, but no order was made thereon and it was withdrawn.

On the following day Holz filed in this Court the certificate and affidavit of the clerk, and applied for and obtained an order extending the return day for thirty days.

Without the previous proceedings above noted, the last named application and order would have come too late and would have had no effect.

But I am compelled to regard the first motion and affidavit timely filed, as substantially an application for an extension until, by proper writs to be invoked "without delay," he could obtain the record. They could have had no other possible motive or purpose, and I consider them a substantial compliance with our rule.

In such matters we should not stick in the letter, but seek the spirit and meaning of the application.

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Our rule is in the following terms: "Motions for extension of time to file transcripts must be supported by affidavit of the clerk of the lower court, or of the counsel, or of the mover. Such affidavit must state specifically the causes which prevented the completion of the transcript within the legal delay."

Now, here an affidavit was filed stating very specifically the causes of the non-filing, and it was accompanied by a motion, the meaning and purpose of which could be no other than to ask an extension of time. We have frequently held that the timely filing of such a motion, though made when the court is not in session, and, therefore, not acted on, suffices to protect the rights of the party. I think the appellant stood under such protection, and that our regular order of the following day was lawful and valid.

I, therefore, dissent from the opinion and decree herein.

No. 10,113.

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THE STATE EX REL. BARBER ASPHALT PAVING COMPANY VS. CITY
OF NEW ORLEANS ET ALS.

Section 1 of Act 5 of the Extra Session of the Legislature of 1870 deprives the courts of this State of jurisdiction or authority to grant a writ of peremptory mandamus against the Comptroller or Treasurer of the city of New Orleans, the object of which is to enforce the payment of money claimed of the said city.

Act 109 of 1886 directs the performance of certain duties by the *City Council alone*, and imposes on the Comptroller and Treasurer the performance of none. Its provisions do not appertain to the executive department of the city government, but same are exclusively confirmed to the legislative department thereof.

Mandamus does not lie for the enforcement of that act.

Former opinion did not hold that Act No. 5 of 1870 barred the writ of mandamus as a remedy to enforce performance of specific duties imposed by subsequent legislation on the city of New Orleans, its Council, or any of its officers; but that the law invoked by relator did not impose the specific duties for the performance of which the mandamus was asked.

Held: the word "revenues," as used in Act 109 of 1886, necessarily means the budget estimate of revenues, because otherwise it would be a mathematical impossibility to frame the budget in accordance with the requirements of the city charter.

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

Levy & Blair for Relator and Appellee.

W. H. Rogers, City Attorney, and Nicholls & Carroll, for Defendants and Appellants.

The opinion of the Court was delivered by

WATKINS, J. The relator seeks, by mandamus, to compel compliance with the provisions of Act 109 of 1886. To coerce the City

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Comptroller to warrant on the City Treasurer in payment of the sum of \$44,453 27, alleged to be due it for certain work done, under a contract with the city, in paving certain streets with sheet asphalt; to compel the City Treasurer to pay said warrant out of the 1887 revenue, and to require the City Council, Comptroller and Treasurer to reserve and set apart 20 per cent of the revenues and receipts of the city for the year 1887, "i. e., twenty cents out of every one hundred cents that are collected and paid into the treasury of the city, and to confine appropriations for the government of the city, for all other purposes, *except for permanent public improvements*, to 80 per cent of the *actually collected* revenues of the said city for the year 1887" and, further, to require the said Comptroller to warrant on and the said Treasurer to pay said warrants, in their favor, out of the fund thus created and held in reserve; and, further, to require each one and all of said persons and officers "to set aside for the reserve fund of 1887 all rights, sums, interest and credits received from miscellaneous or contingent sources, as provided in the said act."

The relator, also, seeks to restrain the city and said officers, by injunction, from paying out, for any other purpose than for permanent public improvements, more than 80 per cent of the revenues of the said city for the year 1887, as they are collected and paid into the city treasury, and said Comptroller from warranting on, and said Treasurer from paying out, the said reserve fund for any other purpose than for permanent public improvements.

To this petition the city of New Orleans tenders the following peremptory exceptions, viz:

1. That relator's petition discloses no cause of action.
2. That such remedy and relief as are herein sought are not warranted by law.
3. That the writ of injunction cannot issue in the premises, "as the proceedings are to compel the performance of a ministerial duty, and the injunction seeks to compel the performance of duties which are mandatory."

Reserving the benefit of these exceptions, the city, for answer, pleads the general issue, and specially denies the power of the court "to regulate the mode and manner of distributing the alimony allowed by law, which is fixed at the rate of ten mills upon the dollar of the revenues derived from taxation and other sources necessary for the government of said city, and which are fixed by law. That the relief sought by plaintiff would operate a complete cessation of the corporate business and make it impossible for the government to exist."

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She alleges full compliance with all the laws of the State, and avers that she *has provided for a reserve fund and set the same aside, as under the law she was bound to do; but that said reserve has not yet been realized*, and there is no money with which to pay relator's claim.

On these issues and pleadings the cause went to trial, and there was a judgment making the mandamus peremptory as to all parties and the injunction perpetual; and from that decree the city has appealed.

We will first address our attentions to the respondent's exceptions:

There appears to be no dispute about the facts of this case. The relator made certain permanent public improvements for the city in the way of pavements on certain streets, consisting of sheet asphalt. This work was done in pursuance of a contract with the city, under the paving laws of the State, and in which the city agreed to pay a portion of the cost of construction. The amount of the relator's claim is not denied, and there is no complaint of the work done by the relator in pursuance of this contract. There is no claim made that any part of the relator's demand has been paid. The city's answer admits the force of the law, the provisions of which are sought to be enforced against her, but avers full compliance therewith, and "all laws of the State."

Under this state of facts has relator disclosed a cause of action.

Section 1 of Act No. 5 of the Extra Session of the Legislature of 1870 provides that "no court within the State shall have authority or jurisdiction to allow, hear, entertain or enforce any summary process, or proceeding, or writ, or order of mandamus, * * either against the Comptroller, * * the object of which shall be, either directly or indirectly, to obtain or compel said Comptroller * * to issue and deliver any order or warrants for payment of money, or against the Treasurer or any officer * * charged with the disbursement of the moneys of the city of New Orleans, the object of which shall be, either directly or indirectly, to enforce the payment of money claimed to be due from the city of New Orleans to any person, persons or corporations; but *all actions or proceedings* for the recovery of any sum of money claimed to be owing by the city of New Orleans shall be in the *ordinary form of action*, instituted against the city of New Orleans as a corporation, and not against any branch, department or officer thereof, and shall, in all respects, be conducted in the same manner as *other ordinary actions*"

This statute has received repeated interpretations by this Court and its predecessors, and it is still a law in force. The question is,

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therefore, in what way is the relator's case taken out of its operation and effect? Or what plain, ministerial duty imposed by the act has the respondent city failed or refused to perform? Or what plain, ministerial duty is there invoked outside of and not inconsistent with that act which said respondent failed to perform?

The relator has not obtained a judgment against the city on its demands, and consequently is not entitled to the Comptroller's warrant on the Treasurer "*without any special appropriation of money therefor by the Common Council,*" as provided in section 2 of said quoted act, and for the same reason its claim could not have been designated "*in the annual budget for the payment of judgments against the city,*" as indicated in section three of that act.

The objects of this proceeding are three-fold, viz :

1. To compel the City Council, Comptroller and Treasurer to reserve and set apart 20 per cent of the revenues and receipts of the city for the year 1887 as a reserve fund for public improvements.

2. To compel the Comptroller to warrant on the Treasurer for the amount of their demand, said warrant to be made payable out of said reserve fund.

3. To compel the Treasurer to pay said warrant out of said reserve fund when it is presented. The duty, in the performance of which the said respondent city is alleged to be in default, is one not embraced in or covered by the quoted act, but is placed by the relator under Act 109 of 1886.

It is necessary here to examine this act and ascertain its scope and object, in order to determine the *character* of the duties, if any, that are imposed upon the respondents, and, further, to determine whether performance can be enforced by mandamus, as claimed by the relator.

The act purports to be an amendment of Sec. 66 of Act 20 of 1882, it being the city charter, and repeals a former amendment thereof, it being Act 88 of 1884. All of these acts appertain exclusively to the appropriation for, and the disbursement of, the respondent city's revenues.

Section 66 of Act 20 of 1882 provides that "*the Council shall not, under any pretext whatever, appropriate any funds for the government of the corporation to the full extent of the estimated revenues, but shall reserve twenty-five per cent of said estimated revenues, which reserve, and all sums, rights, interests and credits received from miscellaneous or contingent sources, shall be appropriated by the Council for the purpose of public improvement, as herein provided for.*"

Act 88 of 1884 consists of a single section, and purports to be an

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amendment of Section 66 of Act 20 of 1882, last above quoted ; but the amendment consists solely in reducing the amount to be reserved from 25 per cent to 10 per cent of the estimated revenues.

Act 109 of 1886 consists, also, of a single section, and repeals Act 88 of 1884, and amends Section 66 of Act 20 of 1882. This amendment consists in these alterations only, viz :

1. The elimination of the word "estimated."
2. The reduction of 25 per cent to 20 per cent.
3. The interpolation of the word "permanent" before "public improvement."

It is worthy of special notice that each one of the acts quoted employs the *same* language in directing the performance of the duty that is therein imposed, viz : "the *City Council* shall not, under any pretext whatever, *appropriate* any funds," etc. Neither one of those acts, in any manner, appertains to the *executive* department of the city government. Sec. 12, *et seq.*, Act 20 of 1882 :

"The executive power of the city of New Orleans shall be vested in one mayor, one treasurer, one comptroller, one commissioner of public works, and one commissioner of police and public buildings." *Ibid.*

"The comptroller shall have a general superintendence of the fiscal affairs of the corporation.

* * * * *

"The comptroller shall not warrant upon the treasurer for the payment of any bill, requisition, claim, pay-roll or demand of any nature whatever, whether the same arise out of contracts or otherwise, except such bill, requisition, claim, pay-roll or demand is presented to said comptroller with the signature of the chairman of the finance committee of the council indorsed thereon in approval of the same," etc. Sec. 21.

The duty of the treasurer is to receive and safely keep all moneys, assets, etc., belonging to the city, and to pay money on the warrants of the comptroller or other officer designated to act in his place, "and in no case shall the treasurer pay any claim whatever against the city except in the manner set forth." Sec. 22.

"The *legislative* power of said corporation shall be vested in a council composed of thirty members," etc. Sec. 2.

It is obvious, from a simple inspection of the acts cited and the one relied upon by the relator's counsel, that no duty is imposed upon either the Comptroller or Treasurer of the city, and that the duty that is imposed upon the legislative department of the city government is a *limitation upon its power to make appropriations* of the revenues of the

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city as well as a requirement that it shall reserve 20 per cent "for the purpose of permanent public improvements."

Now if the construction of the law contended for by relator's counsel be conceded to be correct, there is an insuperable difficulty in the way of the remedy he seeks, and that is the absence of any provision appertaining to the *fiscal* affairs of the city, and the presence only of such provisions as relate to the "revenue and expenses" of the city government, and which are under the control of the City Council exclusively. Relator does not seek to control or supervise the manner in which the City Council has created the annual budget of expenses for the year 1887. It is not alleged that it is entitled to have the Council levy a special tax out of the proceeds of which its claim is to be paid by preference. It is not claimed that the rate of taxation should be increased in order that relator's claim be satisfied. Reduced to a last analysis, the contention of the relator is that the duty of the City Council is, under the law, to see to it that the Comptroller shall place in the reserve fund 20 per cent of the gross revenues of the city as they are collected, and warrant on said fund in its favor for the full amount of its demand.

We fail to discover in the law any warrant for this contention. Either the law is defective in not more specifically directing the mode in which this fund was to be created and reserved for "permanent public improvements" by the City Council, or they have been derelict in the enforcement of it by their failure to pass appropriate ordinances requiring the Comptroller to set apart and reserve the 20 per cent in such a manner as to make it available to public improvement creditors.

The one can be remedied by the Legislature and the other by the City Council. Each involves additional legislation. It is not our province to enlarge laws of the State or city so as to meet the exigencies of a particular cause, however meritorious. In view of the provisions of Act 5 of 1870, and the decisions of this Court interpreting it, we conclude that plaintiff's petition discloses no cause of action. 30 Ann. 78, 129, 710; 34 Ann. 875, *State ex rel. Fernandez vs. Judge*; 35 Ann. 781, *State ex rel. Klein & Co. vs. City*; 37 Ann. 13, *State ex rel. Marchand vs. New Orleans*.

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed; and it is further ordered, adjudged and decreed that the preliminary writ of mandamus be set aside, the injunction dissolved, and the relator's demands rejected, at his cost in both courts.

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ON APPLICATION FOR REHEARING.

FENNER, J. The brief for rehearing entirely misconstrues our original opinion in assuming that we held that Act No. 5 of 1870 operates as a bar to judicial enforcement, by mandamus and other appropriate remedies, of the performance of specific duties imposed by subsequent legislation upon the city of New Orleans, its Common Council, or any of its officers. The contrary has been too frequently affirmed by this Court to be longer a subject of controversy. *State ex rel. Canal Co. vs. Pilabury*, 30 Ann. 129, 708; *State ex rel. De Leon vs. City*, 34 Ann. 480; *State ex rel. Klein vs. City*, 35 Ann. 781; *State ex rel. Marchand vs. City*, 37 Ann. 19; *State ex rel. Bauman vs. City*, 38 Ann. 43.

The city would indeed be an *imperium in imperio* if she were thus emancipated from judicial power to compel her to obey the specific mandates of her sovereign and creator, the State. We cited the Act of 1870 as barring the remedy of mandamus, except to enforce some particular specific duty imposed by a valid, subsisting law of the State, for the purpose of eliminating all questions except the single one whether the laws relied upon by relator did impose upon the defendants the particular duties set forth in the petition and of which the mandamus was invoked to compel the performance. We held that the said laws did not create such duties, and, therefore, the petition set forth no cause of action.

We do not hesitate, however, to say that relator's construction of Act 109 of 1886 is entirely incorrect in every respect.

That act was one amending section 66 of the city charter, and must be construed in connection with the other section of that instrument. Sections 64, 65 and 66 (as amended) read together as follows:

“REVENUE AND EXPENSES.”

“SEC. 64. That the council shall, once in twelve months, before fixing and deciding upon the amount of taxes and licenses to be assessed for the ensuing year, cause to be made out a detailed estimate, exhibiting the various items of liability and expenditures including the requisite amount for all expenses during said year, and shall cause the same to be published for at least ten days in the official journal of the city, and such rate of taxation as provided by law, on every hundred dollars of valuation, shall thereafter be fixed and assessed as, together with other revenues of the city, may be necessary to meet said estimated liabilities and expenditures. The adoption of said detailed estimates shall be considered as the appropriation of the

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amount therein stated, and the comptroller shall not audit nor shall the treasurer draw or sign any checks upon the fiscal agent therefor of any claims, unless an appropriation therefor has been duly made in accordance with this act.

"SEC. 65. The council, in fixing the budget of revenue and expenses, as herein provided for, shall not consider and adopt as a revenue miscellaneous or contingent resources, and affix thereto either an arbitrary or nominal value or amount; but, whenever such resources are considered and adopted, they shall be estimated on a real and substantial basis, giving the source whence to be derived, a specific sum to be received from each item thereof and no more. The council is hereby prohibited from estimating for expenditures to be derived from any uncertain or indefinite source, cause or circumstance; but the council shall, by proper ordinances, provide for the receipt and disbursements of any sums of money, interests, rights or credits that may accrue to the corporation by behest, grant or any cause whatever; and all such sums, rights, interests or credits so received, shall be and are hereby appropriated for the purpose of public works and improvements, the manner and details of such appropriations to be ordered by the council.

"SEC. 66. The council shall not, under any pretext whatever, appropriate any funds for the government of the corporation to the full extent of the revenues, but shall reserve twenty per cent of said revenues, which reserve, and all sums, rights, interests and credits received from miscellaneous or contingent sources shall be appropriated by the council for the purpose of permanent public improvement, as herein provided for."

It is so evident to our minds that the term *revenues*, as used in Sec. 66, means the revenue fixed in the budget, or the budget estimates of revenues, that exegesis is difficult.

All three sections refer exclusively to the formation of the budget, which is the fixing in advance the *modus vivendi* of the city for the ensuing year, by a careful estimate of the expenditures and revenues. The Council is first required to make an estimate of expenditures, and, but for Sec. 66, it would not be allowed to levy a greater rate of taxation than would be *necessary*, with other revenues, to provide for said estimated expenditures. But Sec. 66 authorizes the raising of a revenue 20 per cent beyond the estimated expenses, and devotes the surplus as a reserve fund to be appropriated to public works and improvements. Hence, the city is authorized and is bound to estimate and to provide a revenue, 80 per cent of which, *no more or no less*,

Howe, Executor, vs. Powell et als.

is equal to her estimated expenditures, and this 80 per cent is irrevocably appropriated to these expenses. How would the city comply with these mathematical requirements if, as relator contends, she is authorized and required to appropriate 80 per cent, not of her estimated revenues, but of the revenues which shall be thereafter actually collected? How can she tell in advance what deficiency may result in the collection of her revenues? How is she to adjust her estimate of expenses and her corresponding provision of revenue in exact proportion or equality to an unknown quantity? The law did not contemplate or require any such impossibilities. It is plain the city must place on her budget, in exact figures, the liabilities and expenditures, and these must be just 80 per cent of the sum designated in amended Sec. 66 as "revenues." Unless some mathematical process can be invented whereby to calculate a percentage of an unascertained sum, relator's construction is impracticable, and we must treat the elision of the word "estimated" before "revenues," as used in previous statutes, as the simple correction of an useless tautology.

Rehearing refused.

No. 10,127.

CHARLES L. HOWE, EXECUTOR, VS. JOSEPH H. POWELL ET ALS.

An act, purporting on its face to be a sale *a réméré*, is not translatif of the ownership of the real estate to the purchaser, when it is shown that the parties did not intend that it should so operate.

Such sales, made for an inadequate consideration and unaccompanied by delivery, will be treated, without sufficient evidence to the reverse, as contracts, by which the thing nominally sold stands as security and nothing else.

Property admitted to be worth more than \$2500 cannot be claimed to have been sold, even *a réméré*, when the price stipulated is \$460, or even \$1000, and possession was not delivered.

The vileness of the price and the retention of possession establish that the contract was designed solely to subject the property as a security.

Such an innominate agreement is in the nature of a pignorative contract, by which a *quasi* hypothecary right is conferred. It is recognized by the jurisprudence of the State as a contract of security, and may be enforced, on a proper proceeding and showing, for specific performance.

This cannot be done in a suit which is strictly a pure and simple petitory action, involving nothing but rights of ownership.

A PPEAL from the Seventeenth District Court, Parish of East Baton Rouge. *Burgess, J.*

L. D. Beal and H. C. Miller for Plaintiff and Appellant:

A sale for a lawful consideration, with the right reserved to the vendor to repurchase the property within a certain period, is a sale with the right to redeem, and passes the title unless within the period the vendor does repurchase. See Civil Code, Arts. 2439, 2567, 2655; 34 Ann 301.

40	307
44	928

40	307
45	616
45	1123

40	307
50	1125

40	307
105	470

40	307
4110	296
110	296
111	416

40	307
114	823

40	307
118	327
120	1037

40	307
122	656

40	307
125	931
125	936

Howe, Executor, vs. Powell et als.

Such an act acknowledged before a Louisiana commissioner in Ohio has the force of an authentic act here. R. S., Sec. 603.

The written act in authentic form or acknowledged is the only exclusive evidence of the intention of the parties; excludes all previous statements or writings, and unless assailed for fraud, or a counter letter is reserved, is conclusive between the parties of the contract it expresses. See Civil Code, Arts. 2234, 2242, 2239, 2336; 5th New Series, p. 3; Greenleaf on Evidence, Sec. 275; 1st Hennen's Digest, p. 534; No. 4, p. 536; No. 12.

Kernan & Laycock for Defendants and Appellees:

1. Where the parties reside in a common law State, and the instrument is executed in a common law State in the form of a common law mortgage, there can be no doubt the parties intended to create a mortgagee. 19 Ann. 489.
2. Redeemable sales unaccompanied by delivery of the thing sold, of which the considerations are inadequate, courts are bound to consider, without sufficient evidence to the contrary, as contracts, for which the thing nominally sold stands as security and nothing else. *Collins vs. Pellerin*, 5 Ann. 99; *Le Blanc vs. Bouchereau*, 16 Ann. 11.
3. The conveyance of property in the form of a sale does not vest the ownership in the apparent buyer if the deed was really intended by both parties to be a mortgage. 38 Ann. 154.
4. The court will judicially notice, without proof, that the common law prevails in our sister States. 34 Ann. 925.
5. No one can transfer a greater right than he himself has.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is a petitory action. It is brought against the tenant or occupant of the property, but the parties claiming adverse title have joined issue.

The plaintiff claims that the real estate, which is situated in Baton Rouge, was sold by Kleinert to Gaff, whose executor he is, the former having acquired it from Cochran in 1877.

The defense is, that the property belongs to the respondents by purchase from the same Cochran in 1878; that the original act by the latter to Kleinert was not designed to be a sale, but merely a mortgage, to secure a debt; that the price was wholly inadequate and possession was never given to Kleinert, but was retained by him and passed with the ownership from him to the respondents, who still have it; that the act from Kleinert to Gaff, on which plaintiff relies, was a mere transfer of his rights against Cochran; that the act was never properly recorded; that the debt and mortgage are prescribed, etc.

From a judgment for the defendants, the plaintiff appeals.

It appears that the act between Cochran and Kleinert was executed in Ohio. It has all the characteristics of a sale, but contains the pact of redemption within a specified delay.

The property is admitted to be worth more than \$2500, and the price of sale is stated to be \$460.

Howe, Executor, vs. Powell et als.

It was recorded in the mortgage book and in that of notarial records in 1877, previous to the sale to the defendants. The transcript does not show that the "notarial records" are the conveyance book in which sales and other transfers of real estate are required by law to be recorded, to affect third persons.

It is shown by a letter of Gaff that he considered the property as having been mortgaged by Cochran to Kleinert, and he directed his agent to acquire the mortgage for him. Objection was made to the admission of this letter, but it was properly overruled, as it was written evidence opposable to the party in whose name the property is claimed.

Conceding, however, that the act in question was properly recorded and that no evidence was received to show the intention of the parties, Cochran and Kleinert, the only question which seriously arises in the controversy is: Whether that act did actually transfer *title* of ownership to Kleinert?

The act is evidently a sale with the faculty of redeeming, *vente à réméré*.

The text of the law and the jurisprudence upon it are to the effect that by such sale the ownership passes to the purchaser, who, most of the time, is a mere money lender; but that on payment to him of the amount mentioned in the act, he is divested of that ownership, which passes to the original vendor. In two late cases we had occasion to consider that matter to some extent.—*Lawler & Huck vs. Cosgrove*, 39 Ann. 488; *Davis vs. Citizens' Bank*, *Ib.* 523; also *Jackson vs. Lemle*, 35 Ann. 855.

But the law and the jurisprudence only thus say, where the transaction is really a sale, *à réméré*—that is, where, among other requirements, the price paid was adequate, i. e., in reasonable proportion to the true value of the property. *Stewart vs. Buard*, 23 Ann. 201.

Hence it is, that when the price is inadequate and possession has not been delivered to the purchaser, but was retained by the vendor, it has uniformly been considered and held that the transaction was not a sale, but a mere security; indeed, a sort of *pignorative* contract, upon which the law looks with suspicion, for the protection of the embarrassed and unfortunate debtor against the rapacity of his ravenous creditor.

Indeed, the settled doctrine of this Court on this subject is, that "redeemable sales, unaccompanied by delivery of the thing sold, of which the considerations are inadequate, will be treated by courts, without sufficient evidence to the contrary, as contracts, for which the

Howe, Executor, vs. Powell et als.

thing nominally sold stands as security and nothing else. *Le Blanc vs. Bouchereau*, 16 Ann. 11; *Collins vs. Pellerin*, 5 Ann. 99; *Miller vs. Shotwell*, 38 Ann. 891; see *Ware vs. Morris*, 23 Ann. 665, also p. 201; also *Merlin*, Vo. *Pignoratif Contrat*, 284; *Troplong*, *Vente* No. 695, p. 191; *Baudry Lacantinarié*, Vol. 3, No. 1045, p. 606; *Laurent*, Vol. 28, No. 544, p. 531.

The record shows that the price of sale was \$460; that possession never was delivered to Kleinert, but continued in Cochran, and since 1878 has been in the defendants, and the admission is that the value of the property exceeds \$2500.

The price is about one-sixth of the value. Is it a *rite* price. Had the sale been a real one in the intention of the parties, the vendors would have had the right to demand its rescission for lesion beyond moiety. R. C. C. 2589.

The detained possession by the vendor is a presumption of simulation, for, whosoever sells must deliver possession to the purchaser, unless it be expressly stipulated otherwise for a stated period. R. C. C. 2479, 2480.

It is true that the plaintiff says that besides the \$460 there was another consideration for the sale. The record does not establish this averment of the petition; but even if it did, that supplemental consideration, in the very terms of the petition, would consist of a mortgage debt originally for \$2000, but reduced by partial payments to \$500.

The act does not mention the assumption of that mortgage debt as a part of the price; but, even if it did, the sum at which it was reduced, \$500, added to the \$460, would not make that price to be \$1000, and that amount would still be inadequate as the price of property admitted to be worth more than \$2500.

It is manifest that Cochran never intended to sell to Kleinert, and Kleinert did not propose to buy; that even if they so designed, the transaction would be nullity as a conveyance, owing at least to the *evileness* of the price and the absence of delivery of possession, and that by merely putting the property in the name of Kleinert, Cochran has simply given and Kleinert has only received a *security* for the payment of the sum due him.

In the case of *Ware vs. Morris*, already alluded to, 23 Ann. 665, which is analogous to the present one, the plaintiff claimed to be recognized as owner of the property which the court found had been given as a security for the payment of the debt and asked *no other relief*, the then court affirmed the judgment appealed from, which had rejected plaintiff's demand, because, by the act, the ownership had not been divested and had not passed to the plaintiff.

In the course of the opinion the Court took occasion, however, to say :

“ Here a hypothecary right is given under the false appearance of a contract of sale, possession being retained by the ostensible vendor.”

What was then said, may be repeated here.

The plaintiff has brought a purely petitory action and has prayed to be recognized and put in possession as *owner* of the property which he avers was sold to the deceased, whom he represents.

On the other hand, the defendants resist the claim for *ownership*, alleging that it resides in them. They admit that the contract was intended as a mortgage, or what is nearly the same by implication, as one conveying *quasi* hypothecary rights, and pray that the suit be dismissed and that they be recognized as the owners.

We merely decide here, that even if the act in this case was designed to be a sale *à réméré*, the title did not move from the one to the other.

We do not undertake to name the contract ; but we recognize it as a valid agreement under the jurisprudence of this State, which is susceptible of enforcement, on a proper proceeding and showing, for specific performance. Such a case is not presently before this Court.

When such a claim will be presented, the facts and the law warranting, the contract will be entitled to be given, as against the world, the effect which the parties designed it should have and of which all others had due notice.

The ruling in *Stewart vs. Buard*, 23 Ann. 201, was made in a controversy in which the contract presented the features of a sale *à réméré*, and effect was given to it because it proved to be a *valid* sale of that class.

In the present instance, the contract in appearance is a similar one, but no effect is given to it, because, on scrutiny, it is found not only that the parties did not propose that it should operate as a transfer of ownership ; but, also, that even if they intended otherwise, it does not combine essential elements to make it translatable of the *fee*, which, therefore, never was divested.

As the plaintiff does not ask specific performance, and there is no *issue* on that point, we are powerless to grant relief, even if the circumstances justified.

These views dispense us from passing upon the existence of the debt and of the mortgage against which defendants have, out of caution, pleaded prescription and pre-emption.

Judgment affirmed.

 Succession of Lamm.

No. 10,135.

SUCCESSION OF ADELE LAMM.

OPPOSITION OF MRS. PAULINE KAUFMAN.

Judgment having been contradictorily rendered in a contest between two applicants for the appointment of an administrator, and the unsuccessful party having thereafter joined issue on the merits with the successful party in a suit instituted by him as administrator of the succession, this cannot be considered and treated as such an acquiescence in said judgment as would prevent a *subsequent* appeal therefrom.

When the husband and survivor of the community dies without having administered the succession of his predeceased wife, of which he had the usufruct, his heirs being also the heirs of his wife, the two successions may be settled and distributed among the heirs in his succession alone.

The administration of the succession of the deceased husband necessarily involves with it the administration of the community.

It is only after the heir has been called on by the creditors of the succession to renounce or to take the inheritance, and he asks time to deliberate, that an administrator can be appointed.

The heir who accepts a succession, with the benefit of an inventory, is placed *nearly* on the same footing with curators of vacant estates. His engagement is to administer as *beneficiary heir*.

The result of the whole legislation on the subject is that the heir who accepts, with the benefit of inventory, may institute suits touching the succession without making himself unconditionally liable for his ancestor's debts.

He may even institute suits that are conservatory in their character *before* he either accepts or rejects, provide he claim time for deliberation and make proper reservation, without assuming the capacity of a *simple* heir.

A PPEAL from the Seventeenth District Court, Parish of East Baton Rouge. *Burgess, J.*

Cross & Buckner and *Bernard Titcher* for Opponent and Appellant.

Kernan & Laycock and *Leonard, Marks & Bruenn* for the Administrator, Appellee.

ON MOTION TO DISMISS APPEAL.

The opinion of the Court was delivered by

WATKINS, J. This case presents a controversy over the appointment of an administrator of the succession of Adele Lamm, deceased. She was the wife of Leopold Dalsheimer, deceased. There was a community existing between them, and neither owned any separate property. The wife died on the 26th of October, 1879, and the husband in the spring of 1886. The latter left a will, containing a be-

Succession of Lamm.

quest in favor of Mrs. Pauline Kaufman, one of his forced heirs, of all the disposable part of his fortune; and she was appointed executrix with full seizin. She obtained the probate of the will, qualified as executrix and had an inventory taken, all on the 22d of June, 1886.

On the 6th of July, afterwards, Mrs. Sarah Rose and Henry Dalsheimer, co-heirs of Pauline Kaufman, joined in a petition for the appointment of J. W. Hubbs as administrator of the succession of the predeceased wife, Adèle Lamm, and caused an inventory of *her* estate to be taken. This application was resisted by Pauline Kaufman on several grounds; but she, in the alternative, prayed to be appointed administratrix, if an administration was deemed necessary.

On the trial the court held that an administration was necessary, and that the opponent was entitled to be appointed on giving bond according to law; but it further decreed that upon her failure to furnish a satisfactory bond Hubbs should be appointed upon furnishing bond in her stead.

In January, 1888, Pauline Kaufman procured this appeal, and in this Court—Hubbs having in the meanwhile obtained confirmation of his appointment—he seeks its dismissal on the ground that she had acquiesced in the judgment appealed from by joining issue on the merits with him in the suit entitled J. W. Hubbs, administrator, vs. Mrs. Pauline Kaufman, executrix, the record of which is now before us on appeal, and which is annexed hereto for reference.

It is clear to our minds that it is altogether insufficient for the purpose of proving acquiescence.

The appearance of Mrs. Kaufman was at a date subsequent to the appointment and qualification of Hubbs under the decree of court. That decree was valid on its face. This appeal was deemed necessary to obtain relief from it.

Had she tendered, *in limini*, an exception to Hubbs' capacity to stand in judgment as administrator of Adèle Lamm's succession upon the introduction of this succession record in evidence, it would have been overruled. It is, therefore, obvious that she thereby abandoned no valuable right.

Had she obtained her appeal prior to the filing of her answer it could not have been considered as an abandonment of it, and obtaining it subsequently has no additional force.

The motion to dismiss is denied.

 Succession of Lamm.

ON THE MERITS.

On the inventory caused to be taken by Pauline Kaufman of the succession of Leopold Dalsheimer there appear only two items of property, viz:

1. Community real estate.....	\$5,000 00
2. Community personal estate.....	48 50
	<hr/>
	\$5,048 50

This inventory purports to represent the *entire* interest of the two deceased spouses in the community.

On the one taken of the succession of Adèle Lamm, in pursuance of Hubbs' application on the 6th of July, 1886, there appear the following items of property, viz:

1. Community real estate (one-half interest).....	\$3,000
2. Community rights and credits (one-half interest).....	5,850
	<hr/>
	\$8,850

The real estate that is embraced in each is the same, and, with the exception of \$48.50, the *rights and credits* appraised in the latter represent a valuation of certain articles of community property which Leopold Dalsheimer is alleged to have used and consumed during the continuation of his usufruct and for which he is responsible to the heirs of Adèle Lamm.

Pauline Kaufman opposed the application made for the appointment of Hubbs, on the following grounds, viz:

1. That the succession was already under administration as community property—it having been included in that of Leopold Dalsheimer; and that it is neither necessary or expedient that the same estate should be subjected to another administration.

2. That the *whole* of said property was in the custody and under the control of Dalsheimer as usufructuary and owner, and that the affairs of the community cannot be liquidated and settled elsewhere than in *his* succession.

3. That the *whole* property is under her seisin under the will, in pursuance of a judgment of the court that cannot be attacked collaterally.

In the alternative she prays to be appointed administratrix, if an administration separate from that of the succession of Dalsheimer is deemed necessary or expedient.

Judgment went in favor of opponent, as stated above; but she being dissatisfied therewith appealed.

In the Succession of McLean, 12 Ann. 222 *et seq.*, it was held "that

Succession of Lamm.

the administration of the succession of the deceased husband involves with it the administration of the community."

The Court said in *Flournoy vs. Flournoy*, 29 Ann. 741, that "where the husband and survivor of the community dies without having administered the succession of the wife, of which he had the usufruct, his heirs being also the heirs of his wife, the two successions may be settled and distributed among the heirs *in his succession alone*," etc. 22 Ann. 131, *Pennison vs. Pennison*.

The instant case is exactly similar. The heirs of Adèle Lamm are identically the same as those of Leopold Dalsheimer. The former died first, and the latter did not administer her succession at all. We gather from the record that her succession is solvent and has a large claim against that of her husband for an interest in the personal effects of the community.

We can perceive no reason why that claim, as well as all others, could not be adjusted and settled in due course of the administration of the Dalsheimer's estate.

A community is not a partnership, but even a closer and more intimate union of interests.

In case there should be an insufficiency of community property to pay community debts, the separate property of the husband may be called upon to contribute.

Not only is it entirely proper and right that the succession of the husband should embrace that of his deceased partner in community, but two distinct and separate administrations are unnecessary and would occasion increased expense and litigation.

We are of the opinion that the judgment appealed from is erroneous and should be set aside.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed; and proceeding to render such judgment as should have been rendered in the court below, it is ordered, adjudged and decreed that the application for the administration of the succession of Adèle Lamm be rejected, and that all costs of both courts be taxed against petitioner and appellee.

ON APPLICATION FOR REHEARING.

Owing to the importance of the subject we have thought proper to supplement our views heretofore expressed and against which error is urged.

The application suggests, as a corollary of our opinion, that if the succession of the predeceased wife cannot be administered separately

Succession of Lamm.

from that of her subsequently deceased partner in community, her heirs are denied the privilege of accepting *her* succession, with the benefit of inventory, and *ergo* our opinion is wrong.

The claimants for administration conclude their brief thus:

"The heirs of Mrs. Lamm could sue the executrix of Dalsheimer for and force a settlement of the community; but the heirs of Mrs. Lamm do not wish to accept her succession purely and simply; they do not wish to bind themselves personally for any debts with which her succession may be encumbered; but they are interested in having her succession *administered in order that its debts may be paid*, and that they may receive anything left after payment of debts. The matter *cannot be settled until some one is authorized to act for the succession of Mrs. Lamm*, and the court cannot, we think, properly refuse to appoint an administrator to her succession."

The legal deduction, from this argument, is that an heir cannot accept a succession, *with the benefit of an inventory*, unless an administrator be appointed to take charge of its property and settle its affairs. In support of this proposition they cite and rely upon *Erwin vs. Orillion*, 6 La. 212, in which the court expressed the opinion that "the articles which treat of the appointment of an administrator are from 1034 to 1040 inclusive (O. C.), and they seem to require the appointment of an administrator *in every case where a succession is accepted, with benefit of inventory*."

We have been at the pains to make careful research into our jurisprudence on this question, and have found the following decisions, which appear to favor the opinion quoted, viz.: 6 La. 493, *Poultney vs. Barrett*; 17 La. 500, *State vs. Judge*; 14 Ann. 641, *State vs. Leckie*; 21 Ann. 364, *Succession of De Roffignac*; 27 Ann. 351, *Succession of Linton*.

Opposed thereto we find, however, quite as many, and quite as respectable authorities.

Among the number is *O'Donald vs. Lobdell*, 2 La. 299, from which we make the following pertinent extract, viz.:

"If, indeed, on opening the succession, and before the heir has accepted or rejected the succession, it was a matter of course that an administrator should be appointed, then any act of the heir, *previous to acceptance*, would be irregular, and the suit could not be maintained; but by law the appointment of such an officer is not a matter of course. It is only after the heir has been called on by the creditors to renounce, or take the inheritance, and he asks time to deliberate that an administrator can be appointed. The result of the whole leg-

 Succession of Lamm.

isolation on the subject we take to be, that the heir *may institute suits before he accepts or rejects*. It is true, if he be of the age of majority, and do so *without qualification*, this in itself will be an acceptance.

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"If the creditors apprehend any damages from the heir collecting funds of a succession, which he may thereafter reject, they have the power to call upon him to accept or renounce; and, in default of his *immediate* decision, an administrator can be placed in charge of the estate. Until they do so, however, the succession is not in abeyance, and without a representative.

"The law has expressly said that the heir represents the succession, and is seized of it from the *moment* it is opened." La. Code, 992, 1029, 1032, 1034, 1037.

A similar doctrine was maintained under the old code, antecedent to 1825, as the following quotation from *Cor vs. Martin's Heirs*, 12 O. S. 363, will attest:

"On referring to the Civil Code, where it treats of heirs with the benefit of inventory, it seems that they are placed *nearly* on the same footing with curators of vacant successions.

"In p. 168, Art. 104, we find it laid down that although the heir who accepts with the benefit of an inventory be really the lawful heir and true successor of the deceased, the effect, however, of the benefit of an inventory is to make him appear, in the eyes of the creditors and legatees of the succession rather *as* the administrator of the estate than as the true heir and proprietor of it.

"They may be required, under certain circumstances, to give security for the value of the property contained in the inventory, etc." 11 O. S. 675, *Dufour vs. Camfranc*.

In the still more recent case of *Flower vs. O'Connor*, 7 La. 209, that view was strengthened and fortified by a clearly expressed and well reasoned opinion, from which we have made the following extracts, viz.:

"The defendant being the mother of S. Bell, who died without issue, became his heir-at-law, and was seized of his estate at the moment of his decease, *subject, however, to her right*, * * * *either to renounce it or to limit her liability to creditors by accepting with the benefit of inventory*. She went before the parish judge * * * and declared her intention to accept the succession with the benefit of inventory.

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"The acceptance of the estate * * * was an engagement, as relates to creditors, that if she did not administer the estate according

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to law, as *beneficiary heir*, she would be personally liable for the debts; that if she neglected to take an inventory and other conservatory steps; if, by disposing of the property belonging to the estate as her own, she put it out of her power to make to the creditors a fair exhibit of the means of the estate to pay its debts, then the creditors should have the right to consider her as having forfeited the benefit of inventory and made herself *unconditional heir*."

These views are in strict conformity with the provisions of the Code of Practice, with regard to the method of making settlements of successions.

Articles 990 and 991 provide the mode in which creditors may obtain the sale of the property of vacant estates.

Article 992 declares that "the principles contained in the preceding articles shall apply to *all successions accepted with the benefit of inventory*, whether the heirs are minors or of age, and to all successions administered by administrators."

Article 993 indicates the mode of classifying and the order of paying debts of a vacant estate, and provides that, on default of proceeding accordingly, execution may issue against the property of the curator.

Article 994 provides that like execution shall issue against a tutor or curator "in the same manner as is provided in said (preceding) article against the beneficiary heir, and curator of a vacant estate; and, on said execution, the property of said tutor or curator shall be sold in the same manner as that of a beneficiary heir or curator of a vacant estate."

It must be borne in mind that, in the cited cases, there was under consideration the rights and claims of beneficiary heirs who had accepted their ancestor's successions with the benefit of inventory, not those of heirs who had been called upon by the creditors of the deceased to accept or reject, and who had claimed time to deliberate, and not those of creditors demanding, on that account, the appointment of an administrator.

And such is the apparent situation of the heirs of Adèle Lamm—at least, they signify a willingness to venture such an acceptance, if they should not incur responsibility as *simple* heirs on that account.

In further illustration and enforcement of the principle announced in the older cases, we find in *Bryan vs. Atchison*, 2 Ann. 462, a concise statement of it, as applicable to their exact attitude towards the succession of Lamm, viz: "It is true that, under the dispositions of the Civil Code, when the heirs claimed the time to deliberate, an administrator was to be appointed in all cases, and when the succession was

Succession of Lamm.

afterwards accepted under the benefit of inventory, the administrator was to continue in his functions, and settle and liquidate the succession."

But the Code of Practice, subsequently adopted, provides that an administrator shall be appointed in such cases *if any of the creditors of the succession require it*, and this we take to be the rule now in force, as being the last expression of legislative will, and having, moreover, the advantage to be founded in reason, and to harmonize with other dispositions of the Code of Practice relating to the administration of successions." *Vide*, C. P. 976; R. C. C. 1041 (1034).

That decision was expressly affirmed in the Succession of Story, 3 Ann. 502.

In this manner the decisions we have cited are made perfectly harmonious with the provisions of the Civil Code, which have been interpreted as *requiring*, in such cases as the instant one, the appointment of an administrator. In this manner subsequent jurisprudence, permitting the appointment of an administrator or curator, in *no case*, unless some emergency required it, may be reconciled with the Civil Code and the adverse opinions referred to.

Reference to such of those adverse cases as have been *since* decided, will show that no mention is made of *Bryan vs. Atchinson*, nor of C. P. 976.

In our opinion, the views entertained by the Court, as expressed in *Erwin vs. Orillion*, have been so completely overborne by the opinions of their successors in *Flower vs. O'Connor* and *Bryan vs. Atchinson*, as not to require that it should be any more specifically overruled. It is quite sufficient for us to say that we are in perfect accord with the latter, and are of opinion that it is a conservative doctrine, and one that tends to simplify and facilitate the settlement of successions and to reduce the cost to a *minimum*, and at the same time to deprive the creditors of neither security or safeguard.

Under the operation of this rule there is no impediment in the way of the heirs of the succession of Adèle Lamm. With the proper reservation being made, they may liquidate their demands against the succession of Dalsheimer, by suit or otherwise, without incurring the risk or responsibility they seem to apprehend. Having no interest in the succession of the latter, except that of creditors, nor in that of the former, except that of heirs, the way is easy to the accomplishment of the object they seem to have in view.

Rehearing refused.

Hubbs, Administrator, vs. Kaufman, Executrix.

No. 10,134.

J. W. HUBBS, ADMINISTRATOR, vs. MRS. PAULINE KAUFMAN,

EXECUTRIX.

This Court is bound to take cognizance of its own decisions, and in cases so intimately associated that one is a necessary incident of the other, the decree in one should be so framed as to give effect to the decree in the other, and save litigants unnecessary cost and delay.

A PPEAL from the Seventeenth District Court, Parish of East Baton Rouge. *Burgess, J.*

Kernan & Laycock and Leonard, Marks & Bruenn for Plaintiff and Appellee.

Cross & Buckner and Bernard Titcher for Defendant and Appellant.

The opinion of the Court was delivered by

WATKINS, J. The plaintiff institutes this suit as the administrator of the succession of Adele Lamm, deceased.

It cannot be entertained, because we have just decided that he was not entitled to administer her succession separate and apart from that of her deceased husband, Leopold Dalsheimer, and rejected his demands with cost.

Vide succession of Adele Lamm. Opposition of Mrs. Pauline Kaufman, No. 10,135.

We feel bound to take notice of our own decisions in cases thus intimately associated—one being an incident of the other—and so frame our decree in one as to give full force and effect to the decree in the other, and thus save the parties unnecessary delay and cost.

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed; and it is further ordered, adjudged and decreed that plaintiff's suit be dismissed at his cost in both courts; that the rights of the heirs of Adèle Lamm be reserved in the succession of Leopold Dalsheimer, deceased.

 Oliver vs. Board of Liquidation.

No. 10,075.

WILLIAM OLIVER VS. BOARD OF LIQUIDATION.

It is irregular to proceed by *rule* to compel a legal organization to perform a duty, however clearly imposed upon it.

The objection that such proceeding is unauthorized, and ought to be by *mandamus*, is well founded and cannot be disregarded.

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

W. S. Benedict for Plaintiff and Appellee.

M. J. Cunningham, Attorney General, for Defendant and Appellant.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is an appeal from a judgment commanding the Board to fund certain State warrants, under act No. 3 of 1874, and other acts.

The Board of Liquidation charges that the judgment was rendered on an irregular proceeding by an incompetent court; that the judgment which recognizes the validity of the warrants, and which seems as a foundation for the demand to fund, is an absolute nullity, because rendered without citation duly served, and, on answer filed by and contradictorily with, the clerk of the then Attorney General; because the Board never had legal knowledge of the suit; because, had it been properly notified, it would have set up defenses, destructive at least in part, of plaintiff's pretensions, etc.

That judgment, rendered in November, 1884, by the Civil District Court for the Parish of Orleans, was affirmed by this Court in May, 1885. O. B. 59, fol. 410, No. 9337.

It may be that this judgment is a nullity, but that issue cannot be here passed upon, as the question of *form* of the proceeding to enforce it must be first decided, and the conclusion is in favor of the defendant Board.

The judgment brought up for review is rendered on a proceeding, the object of which is to have the warrants funded by the Board, as though the original judgment had directed the performance of that operation, by that organization.

It is unnecessary to determine whether that judgment, or the law, made it the duty of the Board to fund the warrants. Conceding that either did, the question arises, on the objection of the Board, whether this purpose can be accomplished otherwise than by *mandamus*.

Martine and Husband vs. Hopkins.

The proceeding is by *rule*. The authorities are numerous that, in order to compel a legal organization to perform a duty, even if clearly imposed upon it, the proceeding ought to be by *mandamus*.

No doubt the question of form may be waived and the obligation to perform may be determined on a more summary proceeding by rule; but where objection is made to the form, it cannot be disregarded.

It is, therefore, ordered and decreed that the judgment appealed from be reversed and that the rule to fund be dismissed, with costs, in both courts.

No. 10,122.

ELLA J. MARTINE AND HUSBAND VS. S. F. HOPKINS.

A cause in which the original demand exceeded two thousand dollars, but which, by amended pleadings, finally involves an amount not exceeding two thousand dollars, is not appealable to the Supreme Court.

Hence, such an appeal cannot be sustained.

A PPEAL from the Ninth District Court, Parish of Tensas.
Young, J.

Steele, Garrett & Dagg for Plaintiff and Appellant.

Farran & Kruttschnitt and *J. D. S. Newell* for Defendant and Appellee.

MOTION TO DISMISS.

The opinion of the Court was delivered by

POCHÉ, J. An inspection of the record in this case discloses that, under the effect of plaintiff's amended pleadings, the pecuniary amount involved herein, which is the real matter in dispute, is less than the lower limit of our jurisdiction, and hence the motion to dismiss this appeal must prevail.

Plaintiff's original demand was for an account of tutorship, as well as for an account of defendant's management of her property and funds after the expiration of the tutorship, or, in default, for a moneyed judgment in the sum of \$5775, subject to credits amounting together to \$2275. Confronted by an exception of a wrongful joinder of incongruous causes of action, plaintiff discontinued that part of her demand which had reference to all matters pertaining to defendant's management of her affairs and after the expiration of the tutorship, and the case was tried on the issue thus restricted.

Howe, Executor, vs. Austin et als.

By a reference to her petition it appears that the amount of her claim growing out of the tutorship was \$2075, subject to a credit acknowledged in her petition of \$275, thus reducing her demand to \$1800, which, under her own pleadings, was the largest amount for which she could possibly have recovered any judgment.

It, therefore, clearly follows that we have no jurisdiction of the controversy as presented in this record.

The appeal is therefore dismissed at appellant's costs.

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46 296

No. 10,126.

CHARLES L. HOWE, EXECUTOR, vs. ISAAC AUSTIN ET ALS.

In a contract relating to real estate situated in this State between parties residing in a State where the common law prevails, it is stipulated substantially that one of the parties sells to the other the immovable for a designated price, and, further, that the said sum mentioned as the price was a debt owing to the alleged purchaser by the vendor, and that should said debt be paid by a time stated the act or conveyance should be void. The act was termed by the parties "a deed of mortgage," and was recorded in the mortgage record book of the parish where the property was situated. *Held*, that the instrument was a common law mortgage and did not have the effect of passing title to the property.

A PPEAL from the Seventeenth District Court, for the Parish of East Baton Rouge. *Burgess, J.*

L. D. Beale and H. C. Miller for Plaintiff and Appellant:

The sale of property by the debtor to his creditor for eleven hundred dollars, the act stipulating that if the debtor pays his promissory note for eleven hundred dollars within a certain period the sale is to be void, whether viewed as a sale on condition or with the right to redeem reserved, in either view conveys title to the purchaser. If within the period the vendor does not pay his note. See Civil Code. Arts. 2021, 2045, 2439, 2567; 2 La. 103.

The written title in authentic form or acknowledged by the vendor is conclusive on the vendor and his heirs, unless assailed for fraud or a counter letter is reserved. See Civil Code, Arts. 2234, 2236, 2242, 2239, 2276; 19 La. 409; 11 La. 416; 1st Hennen's Digest, p. 534; No. 4 *et seq.*, p. 536; No. 12.

Kernan & Laycock for Defendants and Appellees:

There can be no *vente a remere* without a stipulation for the return of the price. A contract of sale, the validity of which is made to depend on the payment of notes which form no part of the consideration, is not a *vente a remere*. *Dowdes vs. Scott et al.*, 3 Ann. 278.

Where it is evident that an instrument in the form of a conditional sale was intended by the parties to be executed in the form of a common law mortgage, it will not be regarded as a sale. 15 Ann. 386.

Where the parties to the instrument both reside in a common law State, and the instrument is executed in a common law State in the form of a common law mortgage, there can be no doubt the parties intended to create a mortgage. 12 Ann. 489.

The conveyance of property in the form of a sale does not vest the ownership in the apparent

Howe, Executor, vs. Austin et als.

buyer, if the deed was really intended by both parties to be a mortgage. 38 Ann. 154.

A contract of sale in which there is a stipulation that the vendor may redeem the property by returning the price within a certain time, where the vendor remains in possession of the property and the price is inadequate, will be regarded not as a sale, with the equity of redemption, but merely as a security for the return of the money paid to the vendee, unless sufficient evidence to the contrary be produced. 16 Ann. 12; 5 Ann. 99.

The opinion of the Court was delivered by

TODD, J. This is a petitory action instituted by the plaintiff, testamentary executor of Thos. A. Goff, deceased, late of Aurora, Indiana, to recover for the succession of the deceased a tract of land situated in East Baton Rouge and described in the petition.

The claim is based upon an instrument set forth in the petition, and termed a sale by the plaintiff. It bears date the 28th of April, 1877, and was executed by George W. Corcoran and Martha Corcoran, his wife, residents of Kenton county, Kentucky, in favor of Thomas Goff, a resident of Indiana.

The instrument was indorsed, mortgage from George W. Corcoran and wife to Thomas Goff, and was recorded in the book of mortgages in the parish of East Baton Rouge shortly after its execution, and several years thereafter in the book of conveyances.

Corcoran acknowledged the execution of the instrument and his signature thereto before a notary public of the city of New Orleans, and in this acknowledgment the instrument is termed or described as a deed of mortgage.

The act in question contained a clause substantially to the effect: "That if the vendors paid their promissory note of eleven hundred dollars and interest, held by Goff, the vendee, that then 'these presents' shall be void."

On the 10th of May, 1878, Corcoran conveyed, by an act of sale in its terms complete, the same land to Miss Emma Corcoran and Mrs. Agnes C. Moore, the real defendants in the suit; and on this act of sale they resist the demand of the plaintiff and claim title to the property in themselves.

The act from Corcoran and wife to Goff, of the 28th of April, 1877, on which plaintiff rests his claim to the land in controversy, was not a sale, but a mortgage only, in the common law form—the common law being the system prevailing in the States where the parties resided at the time.

It did not vest Goff with the ownership of the land, or the title thereto, and was not intended to do so; but its sole purpose was to

Brown & Learned vs. Smythe et al.

secure the payment of the debt owing by Corcoran to Goff acknowledged in the instrument. 12 Ann. 480; 15 Ann. 386; 38 Ann. 154; Ib. 890.

The case last cited is that of *Miller vs. Shotwell*, where title was claimed to certain lands in this State under an instrument almost identical with the one relied on by plaintiff in the instant one. In that case the whole subject was thoroughly considered and the adjudications on the point cited and reviewed, and it was expressly determined that the instrument purporting to be a sale, like the one under present consideration, did not convey a title to the property and could only be received as a mortgage given to secure the payment of the debt set forth in the act.

Whether the debt mentioned in this act has been paid or not, or whether the mortgage is or is not still operative against the land, is at present a matter of no concern; the sole question being one of sale or title *vel non*.

This act being the sole foundation of the plaintiff's claim, and it falling, his claim goes with it. He has no case.

Judgment affirmed.

No. 10.125.

BROWN & LEARNED VS. JOHN SMYTHE ET AL.

Creditors whose claims arose subsequent to a judgment of separation of property between husband and wife cannot contest the correctness or validity of such judgment, except, at least, for absolute nullities.

Want of publication of the judgment, unless shown to have been fraudulent or injurious, is not a ground of nullity which subsequent creditors can urge.

Where the judgment allows no money claim against the husband and only recognized the wife's title to a carriage and horses shown to have been her paraphernal property, no execution was necessary, and want of it is not a ground of nullity.

The wife's right to a separation of property is not limited to cases where she has actual claims against her husband which are endangered, but extends also to the case in which his circumstances require it, in order that she may enjoy the fruits of her separate industry for the support of herself and family without liability to her husband's creditors.

A PPEAL from the Ninth District Court, Parish of Tensas.
Young, J.

J. N. Luce and S. L. Elam for Plaintiffs and Appellants.

Steele, Garrett & Dagg for Defendants and Appellees.

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119	687
119	688

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1122	170

Brown & Learned vs. Smythe et al.

The opinion of the Court was delivered by

FENNER, J. The object of this action is to declare the nullity of a judgment of separation of property between defendant John Smythe and his deceased wife, with the view of subjecting certain property subsequently acquired by the wife to the payment of the husband's debts.

The grounds of nullity alleged are two—want of publication, and non-execution of the judgment.

1. *As to want of publication.* Plaintiffs only became creditors of the husband long after the judgment of separation and acquisition of the property by the wife.

It is well settled that such creditors have no right to contest the correctness or validity of the judgment, except, at least for absolute nullities. *Gates vs. Legendre*, 10 Rob. 74; *Brassac vs. Ducros*, 4 Rob. 336; *Morris vs. Williams*, 6 Ann. 391; *Levistones vs. Brady*, 11 Ann. 696; *Noland vs. Bemiss*, 14 Ann. 49; *Farrell vs. O'Neill*, 22 Ann. 619; *Hanney vs. Maxwell*, 24 Ann. 49; *Lewis vs. Peterkin*, 39 Ann. 780.

It is equally well settled that want of publication, unless shown to have been fraudulent and injurious to third persons, is not a cause of absolute nullity. *Turnbull vs. Davis*, 1 N. S. 568; *Raiford vs. Thorn*, 15 Ann. 81.

In this case, moreover, want of publication is not proved. Files of the newspaper in which it should have been published could not be found. The presumption is that the law was complied with.

2. *As to non-execution.* The petition for separation alleged and the judgment allowed no money judgment against the husband, and no claim for any property except a carriage and pair of horses. The evidence establishes that these were her paraphernal property, owned by her before marriage, and the judgment simply recognized her title to them. There was no necessity for the execution of such a judgment. *Jones vs. Morgan*, 6 Ann. 632; *Holmes vs. Barbin*, 13 Ann. 474; *Vickers vs. Block*, 31 Ann. 672; *Baldwin vs. Insurance Company*, 2 Rob. 136.

She would have had the right to hold or resume the possession and administration of such paraphernal property without the necessity of a judgment of separation or execution thereof. Her petition plainly sets forth that her object was, in view of the embarrassment and heavy indebtedness of her husband, "to secure to herself the moneys of her own industry and to enable her to reap the fruits of her own industry." This has been frequently held to afford a sufficient ground for the separation, independent of any actual claims against

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her husband which may be endangered. Davock vs. Darcy, 6 Rob. 343; Jones vs. Morgan, 6 Ann. 632; Wolf vs. Lowry, 10 Ann. 272; Mock vs. Kennedy, 11 Ann. 525; Webb vs. Bell, 24 Ann. 75; Meyer vs. Smith, Ib. 153; Block vs. Vickers, 31 Ann. 672.

The charge that the property acquired by the wife was bought with the husband's means is not only unsustained, but rebutted by proof to the contrary.

Judgment affirmed.

No. 9954

RAYMOND POCHELU VS. EDMOND CATONNET—JAMES FAHEY AND
WILLIAM DOLL ET ALS., INTERVENORS.

A sale made to one not a creditor, for a price in cash, though inadequate to the value of the property conveyed, cannot be annulled at the instance of the creditors of the vendor, who was insolvent at the time, to the knowledge of the purchaser, on the charge of simulation.

A *dation en paiement*, made in consideration of a valid and subsisting indebtedness, cannot be revoked on the charge of simulation, if the conveyance was really intended to pass a title to the property to the creditor, and he really acknowledged full payment of the debt.

In an action *en declaration de simulation*, pure and simple, which is unaccompanied with an *alternative* prayer that if the act complained of is not found to be a fraudulent simulation, it be declared to have been one in *fraud* of creditors, and, as such, annulled, it is not in our power to render judgment annulling it on the latter ground.

It is the settled jurisprudence that this Court is without jurisdiction in revocatory actions which seek to subject property that has been *fraudulently* conveyed to the payment of debts less than \$2000 in amount.

A PPEAL from the Civil District Court for the Parish of Orleans.
Rigtor, J.

Blanc & Butler for Plaintiff and Interveners, Appellees.

Thos. J. Semmes and *T. M. Gill* for Defendants and Appellants.

The opinion of the Court was delivered by

WATKINS, J. Plaintiff, being a creditor of Manual Navos & Co., composed of Edmond Catonnet and Manual Navos, for the sum of \$1000, and of Manual Navos, individually, for \$200, demands the annulment of a certain sale made by Manual Navos to one Henry Rougagnac of a certain coffee-house, fixtures and paraphernalia, which is situated on the premises bearing the municipal numbers 9 and 11 of St. Charles street, in the city of New Orleans, on the allegation that it was a fraudulent simulation.

Pochelu vs. Catonnet.

He likewise demands the revocation of a *dation en paiement* of same property from Rongognac to Bernard Maylie, of subsequent date, on like averment of simulation.

This property was acquired from Thomas Handy by Manual Navos & Co., and while said firm owned it, a portion of said indebtedness was created in the purchase of material's and the price of workmanship employed in the construction of certain improvements and repairs on said premises, and on this property the plaintiff seeks to have his mechanic's lien and privilege enforced.

He charges bad faith, insolvency, fraud and conspiracy on the part of all the parties enumerated and resulting injury therefrom.

He specially charges that the notes of \$1000 and \$400, which Maylie surrendered to Rongognac in exchange for or in consideration of said property, represented no real and actual indebtedness of the latter, but that same were fictitious and simulated.

He represents and claims that said defendants have, by their said wrongful and tortious acts, made themselves jointly and severally liable to plaintiff for the amount of his demands.

He couples with the foregoing averments an allegation of an apprehended transfer during the pendency of the suit, and prayed for and obtained writs of injunction and sequestration.

James Fahey and William Doll, whose united demands aggregate \$1769 75, intervened and joined the plaintiff in the prosecution of his demands and upon similar averments.

The defendants tendered, as an exception *in limine*, the plea of no cause of action, and the same having been overruled, they plead the general issue. But Catonnet made an additional answer to the effect that he was released from all liability by the dissolution of the firm of Manual Navos & Co., by reason of his assignment to Navos of his three-fourths interest in the business of the partnership.

The facts, as we glean them from the records, appear to be as follows:

On the 5th of November, 1885, Manual Navos conveyed the above described property to Henry Rongognac by authentic title, and for the expressed consideration of \$1000 cash in hand paid and the assumption of the October instalment of the rent, \$229 16, then past due. On the 16th of the same month Rongognac conveyed the same property to Bernard Maylie for the expressed consideration of \$1400, evidenced by two promissory notes of the vendor—one for \$400 and another for \$1000—which were surrendered and canceled by the latter.

Pocheta vs. Catonnet.

It appears from the evidence that, finding himself in embarrassed, if not insolvent circumstances, Navos felt it necessary to make some disposition of his property, and, possibly, with the view of satisfying some of his creditors. With this end in view, he proposed to make a sale to one or two different ones of his creditors, but they declined to purchase. He then advertised his property for sale in the newspapers, likewise without avail. He then made the conveyance to Rougognac. It appears that the latter obtained from Bernard Maylie a check of \$1000 with which to make the payment of the purchase price, and it was used as cash in making that transaction with Navos. It further appears that, amongst others, Navos was indebted to Pierre Donnes in the sum of \$700, evidenced by his promissory note, and that he had promised Donnes to pay the note if he would secure him a purchaser for his property. Stimulated, perhaps, by this inducement, he interviewed Rougognac and induced him to become the purchaser. Bernard Maylie was seen and influenced to put up the necessary amount of money to consummate the trade. But, in order to insure the collection of his note, Donnes placed it in the hands of Maylie with instructions to collect it out of the money to be paid to Navos for the property. So it transpired that after the act of sale to Rougognac was executed and signed, the check of Maylie was handed back to him endorsed by Rougognac, and he sent it to bank and had it cashed and handed the cash to Navos, and from the same he withdrew \$700 and applied it to the payment of Donnes' note, and the balance of \$300 was retained by Navos. Immediately afterwards Rougognac went into possession of the saloon and opened up a business.

In addition to this \$1000 cash advanced, Maylie loaned Rougognac \$400, in order to place him in funds with which to pay the arrearages of rent for the month of October, which he had assumed as a part of the purchase price, and the water and electric light bills. It was for these sums the two notes were executed in favor of Maylie, and they bear date November 6, 1885, the day after the sale to Rougagnac is dated, but the day it was consummated.

This transaction caused some comment and criticism among the creditors of Navos. Maylie became somewhat solicitous about the collection of the Rougognac notes, and the result was the execution of the *dation en paiement* of the 16th of November, 1885, and the surrender and cancellation of the notes.

Soon afterwards Navos returned to the saloon and resumed control, to all appearances, as before the sale to Rougognac, but really for Maylie.

Pochelu vs. Catonnet.

A vast amount of testimony was taken in support of plaintiff's and intervenor's charges against the purported conveyances on the one hand, and in support of them on the other, and a comprehensive view of it all has left us under the conviction that the plaintiff has failed to make out his case.

It is evident, to our minds, that neither Maylie nor Rougognac were bound in any way for the payment of the debts due to the plaintiff.

There was no legal impediment existing to prevent Maylie loaning or Rougognac borrowing the \$1000 with which he paid the purchase price to Navos. There was nothing to prevent Navos selling to Rougognac for cash, even though he were in insolvent circumstances to the knowledge of the purchaser at the time. R. C. C. 1936; 19 La-594, Maurin & Co. vs. Rouquer.

A sale to one *not a creditor* must be considered as one made in the ordinary course of business, if made for an adequate consideration paid in cash. The fact that a portion of the purchase money was applied to the discharge of the vendor's debts will not vitiate it as an onerous contract. Such was the view taken of a transaction of this kind in Maurin vs. Rouquer.

It may well be that the act of Navos, in applying \$700 of the purchase money to the payment of Donnes, was an unlawful preference given to him over other creditors, and his failure to apply the remaining \$300 that he received to the satisfaction of other debts he owed, was a fraud on their rights. But neither can afford just ground for the resolution of the sale to Rougognac on a charge of simulation, without the further proof that he was but a party interposed to take title *only*, for the purpose of secreting it from the creditors of Navos.

There is no proof in the record to show that Navos was not really indebted to Donnes in the sum of \$700, or that that sum was not paid to him in satisfaction of his note. It is undenied that Maylie advanced to Rougognac \$1000 with which to pay Navos and \$400 to enable Rougognac to pay rent and other bills. The conveyance to Maylie squared the transaction all round. It may be true that this would have been a fraudulent transaction *if Rougognac had been indebted to any one else*. But from the evidence we are authorized to assume that Maylie was the only one; hence, there was no impediment to the conveyance.

It was, perhaps, the original purpose of Navos to make a simulated sale to Rougognac, but for some reason that purpose was altered and the sale, as described, was entered into.

There can be no reasonable doubt in regard to Maylie having

Pochelu vs. Catonnet.

expended \$1400 in cash in these transactions. and that Navos was the recipient of \$1000 thereof, the most of which was employed by him in discharge of debts.

The prayer of the plaintiff's petition is that said acts "be decreed to be fictitious, false, simulated and fraudulent, and that same may be set aside and held for naught."

Under the state of facts above recited his prayer cannot be granted. These transactions may have been made for an inadequate price; may have been intended, on the part of Navos to defraud the plaintiff and other creditors, and may have affected them injuriously, but in the total absence of any appropriate allegation or prayer, such relief was improperly awarded the plaintiff in the lower court.

The judgment is erroneous in so far as it annuls the sale and *dation en paiement* complained of, recognizes a lien and privilege on the property therein described, and condemns Bernard Maylie for the payment of plaintiff's demands, and in these particulars it should be amended.

It is therefore ordered, adjudged and decreed that the judgment appealed from be amended so as to reject and disallow the plaintiff's demands for the annulment of the sale from Manuel Navos to Henry Rougognac, and the *dation en paiement* from Henry Rougognac to Bernard Maylie, so as to disallow his demand for personal judgment against the latter for the debt of Navos, and so as to reject his demand for the recognition of his mechanic's lien on the property included in said acts, and to dissolve his injunction and sequestration.

It is further ordered, adjudged and decreed that in all other respects said judgment be affirmed, and that the cost of appeal be taxed against the plaintiff and appellee.

ON APPLICATION FOR REHEARING.

The plaintiff and intervenors apply for a rehearing on the ground, mainly, that if they "have failed to prove the *simulation*," their suit should be maintained "under the prayer for the annulment of the contract, and for general relief."

Our opinion quotes the prayer relied on. We considered that their sole reliance was upon proof of the charge of simulation, as there was no alternative allegation or prayer that if the conveyances were not simulated, they were fraudulent. Such demands have been considered as not inconsistent. In the absence of such alternative prayer, we thought it out of our power to grant such relief. But, indeed, if such

Parish of East Feliciana vs. Levy.

a demand and prayer had been specially made, it could not have been determined by us because of our want of jurisdiction, the plaintiff's monied demand being less than \$2000, and that being the test in a purely revocatory action.

Their application must, therefore, be refused.

The defendant, Maylie, complains that he was not relieved from the cost of the lower court, because the judgment of that court was, as to him, reversed entirely.

In this we think he is clearly correct, and our judgment should be amended.

It is therefore ordered, adjudged and decreed that our former judgment and decree be so amended as to tax the plaintiff and appellee with all the cost in the court *a quo* appertaining to the defendant and appellant, Maylie, and that as thus amended it remain undisturbed.

Rehearing refused.

No. 9,936.

PARISH OF EAST FELICIANA VS. LOUIS LEVY.

Section 1 of Act 172 of 1852 exempts from the payment of parish taxes all objects of parish taxation—whether property or occupation—and whether denominated taxes or licenses.

A license, fee or exaction—whatever name or designation is given it—when plainly imposed for the sole, or main purpose of revenue, is, in effect, a *tax*.

The "town of Jackson" includes the inhabitants, as well as the property of that corporation.

A PPEAL from the Sixteenth District Court, Parish of East Feliciana. *Kilbourne, J.*

Stone & Browne for Plaintiff and Appellant.

T. J. Kernan for Defendant and Appellee.

The opinion of the Court was delivered by

WATKINS, J. This suit is brought against the defendant for the sum of sixty dollars, with interest, as the amount he is due for parish license, on the business of retail merchant, in the town of Jackson, in the Parish of East Feliciana, for the years 1884, 1885 and 1886—*i. e.*, \$20 per year for each one of those years.

His answer is, among other things, that he is not liable for any license tax on his business as retail merchant, because it is exempt from all parish taxation by the terms of section 1 of Act 172 of 1852.

The legality of this annual \$20 license is put squarely at issue.

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40	332
48	1226

Parish of East Feliciana vs. Levy.

The evidence shows that the defendant is a retail dealer, or merchant, doing business in the town of Jackson, East Feliciana parish, and paid a State license of \$20 during each of the three years mentioned.

Section 1 of Act 172 of 1852 is couched in the following language, viz.:

"That the town of Jackson, in the Parish of East Feliciana, be and the same is hereby exempt from the payment of *parish taxes*."

The construction which plaintiff's counsel placed on the provision of that act is, that the *property*, which is situated within the corporate limits of the town of Jackson, is alone exempt, and that the *occupation* of the citizen is not; while the construction contended for by counsel for defendant is, that *all* objects of parish taxation, whether property or occupation, come within the operation of the exemption.

Simplified and refined the question is, whether or not a license is a *tax*.

We are of the opinion that it is. License and tax are frequently and properly employed as convertible terms, though not precisely synonymous.

In *Delecambre vs. Clere*, 34 Ann. 1050, we said:

"Whilst this section conferred authority incident to police powers to regulate private markets, * * * it conferred no power to levy a *tax or license*," etc.

Again: "Licenses or taxes may be imposed on certain branches, etc."

In *Metayer vs. Corrigé*, 38 Ann. 711, we said: "The taxing power of the city of New Iberia is its only power for obtaining revenue, by exactions levied upon its citizens, and that power is limited to the *ad valorem* or property tax, and the *license tax*."

Those decisions are in strict accord with the principle of interpretation announced by Mr. Justice Dillon. He employs this language:

"The power to license and regulate particular branches of business or matters is usually a police power; but when *licenses*, fees or exactions are plainly imposed for the sole or main purpose of revenue, they are, in effect, *taxes*."

2 Dillon's Municipal Corporations, sec. 93, 609; 12 Wallace 418, *Ward vs. Maryland*; 29 Ann. 261, *Major vs. Gustave Roth*; 32 Ann. 923, *Board of Trustees of New Iberia vs. Miguez*.

It was evidently the intention of the legislature to exempt all objects of parish taxation from the payment of parish taxes; and the word "taxes" was obviously employed in its broadest sense, and in-

Successions of Haile.

cludes license-taxes as well as property-taxes. It declared "that the town of Jackson * * is hereby exempt," etc. The "town" of Jackson certainly includes the inhabitants, as well as the property that is situated within its limits.

The defendant's occupation comes within the purview of the legislative exemption, and the judge *a quo* was correct in deciding that he was not liable for the parish license claimed of him.

No. 10,131.

SUCCESSIONS OF R. H. AND SARAH J. HAILE.

ON OPPOSITION TO ACCOUNT OF ADMINISTRATOR.

An heir, to whom slaves have been donated, is bound to collate the value of the same, although slavery was subsequently abolished.

The circumstance that no act of donation was executed at the time will not relieve the heir from the obligation of collating, where the donation is admitted by such heir and no one disputes his title, and the slaves, at the opening of the succession of the donor, were not returned as its property, but were retained by the donee.

Collation takes place in all cases in which the donation was not made *hors part*, or as an extra advantage, or part.

Payments made by a father and tutor to the husband of his daughter will not be considered as donations subject to collation, where it appears that, at the settlement of a succession in which the daughter was an heiress, the father and tutor retained in his possession the hereditary share of that daughter, then a minor under his tutorship, such share bearing the amounts paid the husband, the difference being easily accounted for.

A PPEAL from the Seventeenth District Court, Parish of East Baton Rouge. *Burgess, J.*

Wickliffe & Fisher for Opponent and Appellant.

W. W. Leake for the Administrator, Appellee.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The questions presented are simply :

1. Whether an *item* of \$6000 placed on the administrator's account as an amount to be collated by one of the heirs (Mrs. Stewart) should be stricken therefrom ;

2. Whether a sum of \$4000, not mentioned in said account, should be stated therein as to be collated by another heir (Mrs. Mumford).

Those matters are presented by the opposition of Mrs. Stewart, to which Mrs. Mumford joined issue by answer.

From a judgment dismissing the opposition this appeal is taken.

40	334
44	875
40	334
46	757
48	759

Successions of Haile.

I.

The evidence shows that Mrs. Stewart received, at different times, several slaves, valued together at \$6000.

This appears from the inventory and from an averment in the opposition.

It is true that the inventory is not signed by Mrs. Stewart; but this is immaterial, as she admits the fact in her opposition to the account.

There is nothing to show that she has collated in kind by returning the slaves to the succession, and it does not appear that they were sold as part of the assets thereof. The circumstance that she never received any *written* title to the slaves is insignificant, as no one disputes her rights to them and she has apparently acted as their owner.

She charges, however, in her opposition that she is not liable for the value of those slaves and is not bound to collate the same, but there is no reason assigned to support the correctness of this position.

If she was once the owner of the slaves, the fact that they were subsequently emancipated does not relieve her from the obligation of collating. *Ventress vs. Brown*, 34 Ann. 457.

It does not appear that the slaves were donated *hors part*, or as an extra part, or advantage. R. C. C. 1231 (1309).

There is evidence that she was also donated a judgment for \$6000 against her husband, who then owned some real estate worth about half that sum.

It is not, however, shown that the property was unencumbered and that the execution of the judgment could have realized anything from it. Neither is there proof that the judgment was ever satisfied to any extent.

II.

As to the claim that Mrs. Mumford ought to be made to collate \$4000, which her husband received from her father for her account, the record shows that the sum was thus paid in two installments; that afterwards she recovered judgment against her husband for that amount in a suit for a separation of property.

There is nothing to show that these sums were donated to her by her father.

The inference is to the contrary; for it appears that, at the settlement which followed the partition of the property inherited by the heirs, the share of Alice M. Haile, who was then a minor, and who subsequently married F. M. Mumford, amounted in cash and notes to \$3689, which were retained by her father and tutor, who, after her

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marriage, settled and paid the amount with some interest accrued to her husband. This explains the payment of the \$4000 just mentioned.

The opposition was properly dismissed.

Judgment affirmed.

No. 10,143.

R. K. ANDERSON VS. GEORGE C. BENHAM.

Parol evidence is inadmissible between the contracting parties to an act of sale of an immovable to prove its simulation. This can only be done by a counter-letter in writing equivalent thereto. To constitute a counter-letter it is not necessary that it should be contemporaneous with the act attacked. It is sufficient to set aside the act if the writing offered against it, of whatever date, contains an admission that the alleged sale was a simulation.

Nor is the plaintiff in such action debarred by any stipulation in the act, or by the warranty contained therein, from proving the falsity of the act.

A PPEAL from the Eighth District Court, Parish of East Carroll.
Deloney, J.

Montgomery & Ransdell for Plaintiff and Appellant.

W. G. Wyly for Defendant and Appellee.

The opinion of the Court was delivered by

TODD, J. The plaintiff, on the 22d of November, 1870, made a conveyance by act, under private signature, to the defendant, Mrs. Benham, of one undivided half of the plantation described in the pleadings.

On the 22d of May, 1871, he executed another act, by which he purports to have conveyed the entire plantation to George C. Benham, the husband of Mrs. Benham.

On the 5th of February, 1885, he instituted this suit. In his petition he declares, substantially, that in making said conveyances, it was not his purpose or intention thereby to sell the property referred to, or to pass title thereto to the defendants, or either of them, but that the acts were executed for the sole purpose of investing said parties with the ostensible ownership of the property, in order that they might mortgage the same for his benefit, and thereby raise money for him to cultivate the plantation. That such was the understanding of all the parties at the time and was so acknowledged to be by the defendants in a counter-letter subsequently executed. That the acts,

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as sales, were pure simulations, and he seeks by this action to have them so declared.

The defendants' answer contains the general issue, claimed possession of the property of defendants, alleged the disturbance of their possession and slander of their title by the plaintiff; and, further, pleaded prescription and estoppel resulting from the stipulations of the acts of conveyance and the express warranty therein contained. During the pendency of the litigation in the lower court, Benham died, and Mrs. Benham qualified as administratrix of his succession, and filed an appearance as his legal representative.

There was judgment in favor of the plaintiff against the succession of Benham, annulling the conveyance to him, and in favor of Mrs. Benham, rejecting the plaintiff's demand as to one-half of the property claimed by her in her own right. From this judgment the plaintiff and Mrs. Benham, as administratrix, have both appealed.

On the trial of the cause, a document was offered in evidence by the plaintiff and received and filed. It was termed a counter-letter by the plaintiff, but its character, as such, was denied, and its admission objected to on grounds that will be noticed hereafter. It was signed by the plaintiff and both the defendants.

To show the character of the document and the intent and meaning of the parties thereto, we extract from it the following clauses:

"I, Geo. C. Benham, hereby acknowledge that R. K. Anderson is the owner of the undivided half interest of the Robertdale plantation, held by me under deed, dated the 22d of May, 1871, situated in * * * East Carroll parish. * * * And I do hold and respect said Anderson as the owner of the before-described land and all the revenues arising therefrom and improvements and appurtenances thereunto belonging, notwithstanding any deed or act of sale of aforesaid date of May 22, 1871, and I hereby obligate myself * * * not to interrupt or disturb him in the quiet and peaceable possession of said undivided half of said plantation, which he now holds and enjoys. * * * The document signed by Geo. C. Benham and his wife, Carrie T. Benham, and R. K. Anderson, dated May 22, 1871, is hereby declared null and void."

This document is essentially a *counter-letter*. To constitute a *counter-letter*, it was not necessary that it should have been contemporaneous with the deed to which it referred and purported to control and explain; and if properly admitted must be held conclusive upon the question of sale or no sale.

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Most of the objections made to the admission of the document related to the character of the instrument, and therefore went to the effect of it.

It appears that it was executed in duplicate—one copy being delivered to the plaintiff and one retained by Benham.

The copy of the plaintiff's was first offered, and was objected to on the grounds, mainly, that it was mutilated ; that is, that several dates appearing therein had been altered, and that plaintiff was bound by the stipulations of the deed and estopped from attempting to show, by any kind of evidence, that the act was false or simulated.

If the act offered was signed by the parties, and that is not questioned, the alterations made in the dates mentioned, if there was such, was not a sufficient ground for the entire exclusion of the document—it only went to the effect of it.

As to the other objection and the question of estoppel, if the act of the 22d of May, 1871, purporting to sell the property to Benham, was a real act, then, of course, the objection was a good one; but if the act was a simulation, as charged, and which it was the purpose of the suit to establish, and the sole question to be determined then, of course, the declarations of the deed, both as to the sale and the warranty, amounted to nothing—they were as if never written, non-existent. The objection assumes that to be true and real—the deed attacked—which is charged to be fictitious and simulated, and is, therefore, wholly illogical. It is like pleading the judgment itself, which is charged to be null, as *res judicata* against the action to annul it.

This precise question was disposed of in the recent case of *Cole vs. Cole*, 39 Ann. 878, and adversely to the pretensions of the defendant in the instant case.

This counter-letter or writing was, therefore, properly admitted.

Parol evidence was offered to establish the simulation of the act of the 22d of November, 1870—the conveyance to Mrs. Benham—and was properly rejected, for the reason that a counter-letter, or some writing equivalent thereto, is alone admissible and sufficient to establish the falsity of a regular act of sale of immovable property.

The case, therefore, stands thus :

The plaintiff, by the two acts of the 22d of November, 1870, and May 22, 1871, divested himself of title to the entire Robertdale plantation, by the first-mentioned act, selling the one undivided half of it to Mrs. Benham, and by the other, the entire plantation to George C. Benham.

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The counter-letter of the 24th of May, 1875, admits that the act of the 22d of May, 1871, was inoperative and void, and notwithstanding said act that the plaintiff was the owner of one undivided half of the plantation. But there was no admission in the counter-letter, and nowhere else in the record, or other competent evidence to establish the nullity of the conveyance of the 22d of November, 1870, to Mrs. Benham. This act, therefore, must be left intact.

The plaintiff, by deeds regular on their face, having transferred to others the entire plantation, must make clear beyond peradventure and by competent evidence, that he is, notwithstanding said act, still the real owner, and that the acts purporting to pass the title from him were false and fictitious.

He charges that the simulation of both acts is to be inferred from the fact that there was a community of acquets and gains existing between Benham and his wife, and his (plaintiff's) conveyance to the latter was, in truth, a conveyance to Benham, and that Mrs. Benham's joining with Benham in the execution of the counter-letter was virtually an acknowledgement on her part that the sale to her was a simulation, and together with the signature of Benham, that both deeds were false or fictitious.

This is not sufficient. It is to be noted that in the counter-letter that there is no allusion to the act in favor of Mrs. Benham, and this instrument admits or declares the ownership of the plaintiff in only one undivided half of the plantation, and not as to the whole of it, as alleged.

It appears, from the record, that this plantation belouged to the matrimonial community that existed between plaintiff's father and mother, both deceased. That one-half of it plaintiff inherited from his father, who died first, and the other half from his mother.

There is a discussion by counsel as to which half of the property was conveyed to Mrs. Benham, whether the portion derived from the father or the mother, and as which portion, under the decree of the lower court, he, plaintiff, is to be recognized as the owner of.

This is a question with which, at present, we are not concerned, and which, if it were material, from the record before us, it would be impossible to determine.

There was a question raised by the pleadings touching the rents and revenues of the property, but by a written agreement of the parties found in the record, this question was reserved for future determination, and this reservation was properly recognized.

State and Police Jury vs. Isabel.

The case was tried by a jury, and the judgment upon the verdict, as before stated, was in plaintiff's favor against the succession of Benham, and rejecting plaintiff's demand against Mrs. Benham.

From the conclusion reached by us and announced above, we see no reason to disturb that judgment, and the same is affirmed, with costs.

No. 10,073.

THE STATE OF LOUISIANA AND POLICE JURY OF THE PARISH OF
JEFFERSON VS. W. J. ISABEL.

When a party, charged with violating a parish ordinance inflicting a fine for certain prohibited acts, appears and files a plea or demurrer admitting the act, but setting up the nullity of the ordinance, the case involves a contestation as to constitutionality or legality of a fine or penalty imposed, and is appealable to this Court.

The State and police jury having both joined in the appeal, and the defendant being duly cited, all proper parties are certainly before us, and even if the joinder of appellants was unnecessary, it obviates all ground of objection to absence of parties which is urged in the motion.

Because a retailer of spirituous liquors has paid his license he does not become, on that account, exempt from the operation and effect of a police regulation, thereafter ordained by the police jury, in so far as his *subsequent* act, in violation thereof is concerned.

An ordinance passed and promulgated, subsequent to the issuance of a license to a retailer of spirituous liquors, denouncing a penalty of fine against its violation, by such person as shall keep his saloon open after 10 o'clock p. m., is not amenable to the charge of being an *ex post facto*, or retroactive law, unless the act sought to be punished was committed *antecedent* to its passage.

A PPEAL from the First Justice's Court for the Parish of Jefferson.
Chapman, J.

G. Lécbe, District Attorney, and *H. N. Gautier* for Plaintiffs and Appellants.

W. L. Thompson for Defendant and Appellee.

MOTION TO DISMISS.

The opinion of the Court was delivered by

FENNER, J. The Police Jury of the Parish of Jefferson passed an ordinance forbidding the keeping open of taverns, coffee-houses and retail liquor shops after 10 o'clock at night or earlier than 4 o'clock in the morning, and inflicting as a penalty for its violation a fine of twenty dollars for each offense.

Defendant, prosecuted for such a violation, filed a written plea in which he expressly admits the facts charged, but sets up that the ordinance was null and void, because he had paid licenses to the State and

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parish, and the ordinance passed after such payment was *ex post facto*. The justice sustained the plea or demurrer, from which judgment the appeal is taken.

The motion to dismiss is based on two grounds, viz.:

1st. That the case is unappealable.

This is untenable. It is apparent from the above statement that the case involves a contestation as to the constitutionality or legality of a fine or penalty imposed by a municipal corporation. This authorizes an appeal to this Court under Art. 81 of the Constitution.

2nd. That the proper persons are not made parties to the appeal.

Both the State and the police jury are parties appellant, and the defendant was duly cited as appellee. What other party is required we cannot conceive.

It may have been unnecessary for both the State and police jury to join in the appeal, but certainly their joinder obviates all possible defect of parties.

The motion to dismiss is, therefore, denied.

ON THE MERITS.

WATKINS, J. The defendant was arrested on the charge of having violated the following ordinance of the Police Jury of the parish of Jefferson, Right Bank, viz.:

"All tavern and coffee-house keepers, and retailers of spirituous liquors, are forbidden to keep their houses open later than 10 o'clock p. m., or to reopen them earlier than 4 o'clock a. m. following; *provided*, that they shall be allowed to keep open on each *Saturday* night until 12 o'clock, under penalty of a fine of twenty dollars for each and every contravention, unless they are authorized to do so by special permission from the police jury."

On the trial the defendant filed a demurrer to the proceedings against him under the foregoing ordinance, on the grounds substantially, viz.:

1st. That he had paid a State and parish license as a retailer of spirituous liquors previous to the enactment of the ordinance in question, under which he is entitled to keep his place of business open until 12 o'clock at night; hence it violates the law.

2nd. That this ordinance, passed and promulgated subsequently to the issuance of his said licenses—if intended to control him in the exercise of all or any of his rights thereunder—is an "*ex post facto* law,

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which is null and void and retrospective ; and, therefore, he prays to be hence dismissed," etc.

The justice of the peace sustained the demurrer and dismissed the proceedings against the defendant ; and, on his decision, the jurisdictional contention of legality *vel non* of the ordinance is here presented by the State, and parish of Jefferson.

Said ordinance was enacted and promulgated on the 23d of March, 1887, and defendant's violation of it is laid on *Monday*, the 19th of July following.

He relies on the provisions of Section 1 of Act 18 of 1886, as authority for keeping his place of business open until 12 o'clock at night.

That act is commonly known as "the Sunday law." It provides "that from and after the 31st day of December, 1886, all stores, shops, saloons and all places of public business, which are or may be licensed under the law of the State of Louisiana, or under any parochial or municipal ordinance, and all plantation stores, are hereby required to be closed at twelve o'clock on *Saturday* nights, and to remain closed continuously for twenty-four hours," etc.

There is no mention made of any other than *Saturday* night ; and *Sunday* night is included, by necessary inference. Argument is not needed to demonstrate the fallacy of defendant's contention in this particular. This statute is one which contains prohibitions and penalties alone. It does not purport to grant *any* privileges to any one. It was enacted and promulgated antecedent to the said ordinance of the police jury, and it is in no sense inconsistent therewith.

II.

It appears, from the record, that the defendant paid for, and procured his State and parish licenses, on the 28th of February, 1887, antecedent to the adoption of said ordinance, and hence his contention that, if intended to apply to such persons as may have procured their State and parish licenses previously, it is an *ex post facto*, and retrospective law, and cannot be enforced against him.

In answer to this proposition the plaintiff's counsel contend that the police jury had ample warrant, in R. S. Sec. 2743, paragraph 5, for the enactment of the ordinance, as a police regulation ; and in this view he is correct.

For that section provides that "the police juries shall have power to make all such regulations as they may deem expedient.

* * * * *

"To regulate the police of taverns and houses of public entertain-

ment and shops for retailing liquors in their respective parishes," etc.

It is an established fact that the alleged violation of the ordinance occurred long *after* its adoption.

We cannot understand in what respect it is an *ex post facto* or retroactive law.

A statute is said to be an *ex post facto* law when it is intended to punish crimes or offenses committed antecedent to its enactment; and is said to be retroactive when it is to be applied to *past* transactions.

But neither view has any application here, because the *act* sought to be punished occurred *subsequent* to the adoption of the ordinance.

We are referred to no provision of law, in force at the time the defendant procured his licenses, under the authority of which he was entitled to keep open his establishment until 12 o'clock at night, and the privilege of enjoying which the ordinance in question purports to abridge. And we are not aware of any. But, if there was, it would not result therefrom that the ordinance in question was either an *ex post facto* or retroactive law.

The defendant's counsel cites our opinion in Police Jury of Jefferson Parish (Right Bank), vs. Arleaus, 34 Ann. 646, as conclusive against the enforcement of said ordinance.

An examination of it discloses that the defendant was proceeded against for an alleged violation of a police jury ordinance relating to ferries, and he was sought to be condemned to pay a fine, or, in default thereof, to be sentenced to a term of imprisonment. Resistance was made on the ground that the police jury was not warranted by the law in passing an ordinance denouncing the penalty of fine and imprisonment against the violation of its ferriage laws, enforceable in a criminal proceeding *in the name of the parish*.

The court sustained this view, and held that the law, "whilst providing for punishment by fines, expressly declares that the same may be recovered by *suit* brought in the name of the parish," etc. R. S. Sec. 2750.

But the question here is not whether the police jury could promulgate and enforce an ordinance directing proceedings against the violation of her police regulations by indictment or information, but whether it could enforce such an ordinance at all. It is not applicable.

We are of the opinion that the ordinance drawn in question is a police regulation, which the police jury had a right to ordain, and that it is not amenable to the charge of being an *ex post facto* or retrospect-

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ive law ; and that the justice of the peace erred in sustaining the defendant's demurrer, and in dismissing the prosecution.

It is, therefore, ordered, adjudged and decreed, that the judgment appealed from be annulled, avoided and reversed ; and it is further ordered, adjudged and decreed, that the cause be remanded and reinstated for further proceedings according to law, and the views herein expressed ; the cost of appeal to be paid by the defendant and appellee, and those of the lower court to await the final decision of the cause therein.

No. 10,067.

MRS. HATTIE E. WEYMOUTH VS. THE CITY OF NEW ORLEANS AND
J. T. AYCOCK.

Under a contract with reference to a public market by which the sole right conveyed by the city to the third person is the right to collect and appropriate the market revenues, the market remaining subject to all the regulations, control and authority of the city applicable to every other market, the *thing let* is not the market-house, but only the privilege or franchise of receiving the revenues, the market remains the premises of the city and not of the lessee, and the latter does not incur the obligations of a tenant of property to keep the premises safe for those lawfully entering thereon.

When, however, a person has, by contract with public authority, assumed obligations to keep a public highway or other public place in repair, he may be held liable to one who has been specially injured by reason of his failure to perform such obligation.

In such case plaintiff must prove : 1. That defendant has been guilty of legal fault. 2. That such fault was the cause of the accident.

When the evidence fails to show that the fault imputed to the defendant was the cause of the injury, and makes it probable that the injury resulted from a different cause, which operated independently of the fault, defendant cannot be condemned.

Warranty is a covenant, express or implied, arising out of a contract. A person sued for a *quasi offensa* is responsible only on the ground that he has committed a fault, and he cannot call another to warrant him against responsibility for his own faults.

A PPEAL from the Civil District Court for the Parish of Orleans
Rightor, J.

J. B. Guthrie for Plaintiff and Appellee.

W. H. Rogers, City Attorney, for the city of New Orleans, and W. S. Benedict for J. T. Aycock, Defendants and Appellants.

The opinion of the Court was delivered by

FENNER, J. The petition recites that Mrs. Hattie E. Weymouth was the mother of Leila and Alice Weymouth, aged nine years and seven months, respectively.

That her said two daughters were killed August 16, 1886, by falling

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into a well situated in the market-house, on Magazine street, between Berlin street and Napoleon avenue, known as the Upper Magazine Market.

That the death of these children resulted from the fault and was caused by the negligence and lack of skill on the part of the city of New Orleans and Jordan T. Aycock, their servants and agents.

That said market and its approaches have been open to public use for years.

That same was built by Thomas Carey under a contract with the city of New Orleans.

That by said contract, in place of a fixed price, Carey was vested with the right of occupancy and possession of said market-house, buildings and improvements, and the portion of ground whereon same is erected, and with the right of collecting and holding the revenues to be derived from said market-house, and with the right of carrying on a market therein for a period of eighteen years under the conditions of said contract, which is annexed to and made part of the petition.

That Carey had the right to assign and transfer his rights.

That since August 5, 1881, Jordan T. Aycock had been assignee of all Carey's rights under said contract, and that all the duties devolving upon said Carey by virtue of said contract and the operation of the law have devolved and attached to said Aycock since the 5th of August, 1881.

That the city was bound to maintain the market, its walks, approaches and thoroughfares in good and safe condition, and that a like duty devolved upon Aycock as subrogee to the rights and obligations of Carey, under the contract wherein Carey specifically binds himself and assigns to keep said market in good order and condition and to make all necessary repairs thereto.

That at the end of said market property nearest Camp street as an appurtenance to the market exists and has existed for years a deep well or underground cistern.

That said well is located upon and under a public thoroughfare, and on one of the walks and approaches to the said public market.

That the opening down into said well consists of an iron tube or ring fifteen to twenty inches in diameter, said tube being set down into the ground so that its upper rim is perfectly even with the surface of said walk.

That no guard or railing is constructed around the mouth of said well to give a hint of its existence or location to wayfarers.

That the well has been and is left without cover, or without ade-

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quate or secure cover over its said mouth, and is a deathtrap and a constant menace to life (7).

That said contract provides "that a force and lift pump should be placed over said well with necessary pipe and hose, and the well to receive the necessary repairs" (7).

That said provision has never been complied with, or if it has, Jordan T. Aycock has removed same and leaving the mouth of said well unguarded and insecurely and improperly covered.

That on the 16th of August, 1886, her daughter Lelia, carrying in her arms the baby, Alice, while walking through said market-house, fell through the mouth of and into said well left open and unguarded or insecurely covered through the fault and negligence of Aycock and the city of New Orleans, their agents and employees (8).

Under these allegations, coupled with appropriate averments as to the nature and amount of the damages, she claimed a judgment against the city and Aycock *in solido* for \$25,000.

The city filed an exception of no cause of action, on which a final judgment was rendered sustaining same and dismissing the suit as against the city. From this judgment no appeal has been taken, and it is now absolute.

Aycock pleaded a general denial, and also filed a call in warranty against the city, which was cited as warrantor and answered denying its liability.

The case was tried before a jury, and resulted in a verdict and judgment for \$10,000, in favor of plaintiff against Aycock, and in favor of Aycock against the city as his warrantor.

I.

The judgment against the city as warrantor is so preposterous that Aycock's learned counsel hardly ventures to defend it in this Court. Warranty is a covenant express or implied, arising out of contracts. There is no allegation or pretence that the city has failed to comply with any of the obligations of its contract. The sole ground of this action is an alleged *quasi offense*, and if Aycock is responsible at all, it must be because he has been guilty of some *fault* which occasioned the damage. If the damage resulted from the joint or concurring fault of the city and Aycock, they might both be jointly or solidarily liable to the plaintiff, as claimed in the petition; but the city's liability on that ground, so far as this action is concerned, was finally settled by the judgment in her favor. Nothing remained at issue except the question whether Aycock is liable by reason of his own fault; and

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certainly one party cannot be required to warrant another against the consequences of the latter's own faults.

The city, therefore, passes entirely out of the case, and the sole question to be determined is whether Aycock has been guilty of any legal fault occasioning the damage and rendering him responsible therefor.

II.

It is first important to determine Aycock's precise relation to the market by a critical examination of the contract between the city and Carey, in whose shoes, as his assignee, Aycock stands.

The market-house, which had existed upon this *locus publicus* belonging to the city from an ancient date, was burned down. This contract embodies an undertaking on the part of Carey to build a new market-house in conformity to elaborate specifications, in consideration of the right to receive the revenues of the market during the period of eighteen years from the day the market should be completed and accepted by the city.

The only right conveyed to Carey was, in the language of the contract, "the right and privilege of collecting and receiving, for his own use and benefit, the revenues of the market to be built by him," as to which the city subrogated him "to all and singular her rights, actions and privileges to sue for and collect said revenues, but, in no wise, guarantees to the said Carey the payment of any of the fees or charges required to be paid by occupants of the stalls."

The right so conveyed was accompanied by the following obligations, viz:

1. Carey bound himself, "at all times, to abide by, conform and comply with, all and singular, the terms, clauses and conditions of any and all ordinances or regulations that are or may be in force, or that may be hereafter adopted by the city, touching or concerning the government of the markets of the city of New Orleans;

2. He bound himself "to keep the said market in good order and condition, and to make all necessary repairs thereto, and at the expiration of the present contract, to return the said market to the city in good order and condition and in thorough repair."

It was further stipulated that the city would not, during the term of the contract, "alter, change or modify the fees, or charges that are now, by existing ordinances, required to be paid by occupants of stalls."

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We have no occasion to examine the terms of the subsequent transfers by Carey ; since he could transfer nothing but the rights which he acquired.

From the foregoing we consider it clear that the thing let was not the market, but the privilege or franchise of collecting and appropriating the revenues ; that the city accepted, owned and held the market-house as a public market and *locus publicus*, subject to her own control, regulation and police authority, precisely as was every other public market in the city ; and that Carey and his assignee acquired no right, authority or control over the same except said right and privilege to receive the revenues.

The market-house was and remained the premises of the city and not the premises of Carey or Aycock.

Hence, Aycock cannot be held bound by the general obligations of a tenant of immovables under a contract of lease, or of any other controlling occupant, under which such an occupant of premises is bound to keep them safe for those lawfully entering upon them. *Sherman & Redfield Neg.* § 361 ; 1 *Thomson Neg.* pp. 316 and 317.

The execution of the contract conforms to the foregoing plain significance of its terms. Defendant never pretended to exercise any authority or control over the market except to collect the revenues and clean it up as often as required. The city had her commissary for this market as for all others, and no difference is indicated between the authority she exercised over this and that over other markets.

II.

There is, however, another well-settled principle of law, under which a person who has, by contract with the public authorities, assumed specific obligations to keep a highway or other public place in repair, is held liable to anyone who is specially injured by reason of his failure to perform such obligation. *Sherman & Redfield, Neg.* §§ 345, 353 ; *Wilson vs. Jefferson*, 13 Iowa, 181 ; *Phillips vs. Com.*, 44 Penn. St., 187 ; *Robinson vs. Chamberlain*, 34 N. Y., 389 ; *Fulton vs. Baldwin*, 37 Ib. 648.

If Aycock is liable at all it can only be under the application of the foregoing principle to the obligation assumed in the contract "to keep the said market in good order and condition and make all necessary repairs thereto."

The well into which the children fell was situated in the rear of the market-house near the edge of its banquette, was built flush with the banquette, had an opening about fifteen inches in diameter and was covered by an iron lid, which moved by lifting it out the place into which it fitted, and sliding it off like the top or lid of a common stove.

This well had existed in the same place and with the same covering from the time when the market was originally established, very many years before the contract with Carey. It was not injured by the fire. It had never at any time been locked or guarded. It had always been regarded and used as a public well. It was situated in a part of the city to which the waterworks did not extend. The neighbors came in dry seasons to get water from it for washing purposes or to water their stock. Drivers watered their horses there and used it for washing off their vehicles. Fire companies used it for testing or exercising their engines.

At the very time when this accident occurred there were some buildings in course of construction near it, and the masons came to this well for water to mix their mortar and for like purposes. The surface of the water was only about three feet below the banquette, and this made access to it easy and convenient by tying a short rope or string to vessels and drawing up the water.

It is plain that nothing in Carey's contract imposed the duty, or even conferred the right, to interfere with this original and continuous public use, or to lock up the well, or to erect guards around it. He was, at most, only bound to maintain it in the condition in which it was when the contract went into effect and to suffer it to be used as it had always been used.

There is evidence, however, to show that, by long use, the lid had become worn and loose, so that when stepped upon by a passenger it would tilt up and slide off the opening, thus creating danger. It may possibly have been the duty of Aycock to have corrected this defect by repairing the lid; and if it were clearly proved that the accident had resulted from such defect, the question as to his responsibility might be more serious. But the evidence also shows that persons of the public using the well often forgot or carelessly omitted to close the lid. This was an incident of the public use which Aycock had neither the duty nor power to prevent. It was equally likely to occur whether the lid was in good or bad repair, and a person injured by stepping into the well while thus left open by one of the public who had the right to use it, surely could not hold Aycock responsible.

There was no witness to the accident in this case. The elder child with the infant in her arms, had parted with her companions to go home; the nearest route being through the market. They were missed, and, after search, were found drowned in the well. The evidence does not indicate that the weight of such children in stepping on the lid would have been sufficient to tilt and open it, or that, if it had

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been, they would not have escaped falling into so narrow an opening. All the probabilities arising under the evidence strongly corroborate the theory that the well had been left open, and that the child having the infant in her arms, possibly in such position as to obstruct her vision, stepped into the opening and fell through.

The plaintiff necessarily carries the burden of proving two things: 1. Fault on the part of Aycock. 2. That the fault was the cause of the injury. Cases are cited holding that, in the absence of direct evidence, these facts may be sufficiently established by circumstances and presumptions clearly supporting them. See *Hays vs. Gallagher*, 72 Penn. St. 139; *Allen vs. Willard*, 57 Ib. 380; *Whitney vs. Clifford*, 57 Wis. 158; *Seyboldt vs. R. R. Co.*, 95 N. Y. 562.

But where, as in this case, the circumstances and presumptions point to a cause of the accident not occasioned by defendant's negligence, and for which he is not responsible, such authorities are not applicable. The verdict of the jury obviously indicated that they considered the city, and not Aycock, responsible.

It is alleged in the petition, as one ground for Aycock's liability, that under the specifications of Carey's contract for building it was required that "a force and lift pump of suitable size be placed *over the well*, with necessary hose and pipes for cleaning the market, the well to receive necessary repairs." The evidence shows that Carey built the pump, not over the well, but some feet from it, as it had previously existed. This was a matter exclusively between the city and Carey, and as the city accepted the work it is conclusively presumed that the variation was made with her consent and approval.

It is further claimed, in argument, that Aycock's failure to keep the pump in repair was a cause of the public's opening the well. No such allegation of fault is contained in the petition. The evidence shows that even when the pump was in repair the public found it more convenient to draw from the well and often did so, as it had always done. Moreover, the cause, even if it had been alleged, is too remote and is not sustained by the evidence.

On the whole, we feel bound to hold that the plaintiff has not made out such a case against Aycock as would justify us in throwing upon him responsibility for the lamentable accident.

It is, therefore, ordered, adjudged and decreed that the verdict and judgment appealed from be annulled and set aside, and that there be judgment in favor of defendant and warrantor, rejecting plaintiff's demand, at her cost in both courts.

Rehearing refused.

Seixas, Syndic, vs. Gonsoulin et al.

No. 10,042.

J. M. SEIXAS, SYNDIC, VS. ALFRED GONSOULIN ET AL.

40	351
52	931
1120	656
120	925

40	351
122	735

Payment of a note by an endorser, actually bound, produces the legal effect of subrogating him to the rights of the last holder.

Money borrowed, for account of the borrower and applied to the payment of a note, at the request of the drawer, cannot be claimed by the indorser as being his money, though he subsequently issued his check to the original lender, in the absence of proof that the money was lent to him, the indorser.

The unimpeached and positive testimony of the lender that he lent to the borrower, and that he had no previous communication with any one else on the subject, outbalances altogether that of another witness, however respectable, who practically testifies from hearsay.

A PPEAL from the Civil District Court for the Parish of Orleans.
Houston, J.

Bayne, Denégre & Bayne for Plaintiff and Appellee :

An indorser or surety paying a note is legally subrogated to all of the rights of the holder of the note to whom such payment has been made, and this legal subrogation embraces the mortgage given to secure the note. C. C. 2161, 3052, 3053; 2 Martin N. S., 161; 8 Martin Rep. 484, 706; 15 La. 213; 6 La. Rep. 479; 9 Ann. 248; 12 Ann. Rep. 9; Durao vs. Ferrari, 25 Ann. Rep. 81.

Henry C. Miller for Defendants and Appellants :

The payment of a promissory note by or for the maker, or by one not bound for it, extinguishes the note and the mortgage securing its payment. C. C. Arts. 2130, 3411, 2161; Nicholls vs. His creditors, 9th Rob. 476; 2d H. D., p. 1103, Nos. 1 and 9.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The plaintiff sues, as syndic of Carrière & Sons, to participate in the proceeds of certain real estate judicially sold.

He alleges that the note on which he declares, and two other similar notes held by the Citizens Bank and by the Louisiana National Bank, were originally secured by vendor's privilege and special mortgage on the property in question; that the note was, before its maturity, owned by the last named bank; that, as indorsers thereon, A. Carrière & Sons took it up. He then contends that, as they became thereby subrogated to all the rights of the last owner, the proceeds of the real estate judicially sold must be distributed *pro rata* among the creditors of A. Carrière & Sons and the two banks.

The defense is, that the note was *paid* at its maturity by L. Brnlattour, the drawer thereof, and not by A. Carrière & Sons; that it was marked "*paid*" at the time of payment and handed over in that condition.

There is no dispute that if A. Carrière & Sons paid the note they

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are entitled to the relief sought. The note was drawn by L. Brulatour, to his own order, and was by him indorsed. A. Carrière & Sons were subsequent indorsers.

The suit is brought against the purchaser of the property, who retained the proceeds, but the banks are the real defendants at stake.

From a judgment in plaintiff's favor this appeal is taken.

It appears that on the day of maturity—May 19, 1884—of the note in question, which was for \$5000, the drawer finding himself unable to honor it, requested the firm of P. E. Brulatour & Co. to make provision for it; that they, not being in funds, applied to Bertus & Durel, brokers in this city, to loan *them* the amount required; that these did so, by their check, to the order of P. E. Brulatour & Co., who deposited it in bank to their credit; that P. E. Brulatour & Co. then drew their check against the deposit to the order of the Louisiana National Bank; that on presentation of this check the note was marked "*paid*," and delivered to the person who brought the check.

It is also shown that A. Carrière & Sons, on the same day, issued a check of \$5000, which went to Bertus & Durel; that they sent to the bank, in which the note had been deposited for collection, to ask that it be not marked "*paid*," as is occasionally done; but that the request came *after* the note had been paid, marked and delivered.

In order to determine the question as to *who* paid the note, it is necessary to ascertain *whose money* was used for the purpose.

If Bertus & Durel loaned the money, for which they issued their check, to A. Carrière & Sons, owing to some previous understanding with them, there can be no doubt that, although the check was made to the order of P. E. Brulatour & Co., was deposited by them and the proceeds used to take up the note, A. Carrière & Sons must be considered as having paid the note with money, which became *theirs* by the loan to them by Bertus & Durel, through P. E. Brulatour & Co.

The plaintiff relies, to establish this material fact, on the testimony of Nores, a member of the firm of P. E. Brulatour & Co., who says quite distinctly that the brokers' check was furnished at the instance of E. L. Carrière, a member of the firm of A. Carrière & Sons.

On the other hand, Bertus, of the firm of Bertus & Durel, heard as a witness, unequivocally says, that on the 19th of May, 1884, Thomas Brulatour, of P. E. Brulatour & Co., came to them and asked them to *loan them* a check of \$5000, which they would return during the day, which they did, and that, within an hour or two afterwards, before

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3 p. m., P. E. Brulatour & Co., returned them a check of A Carrière & Sons for a like amount. He adds that they had no communication with A. Carrière & Sons about the check, and that the check was furnished Brulatour at the request of Thomas Brulatour and *no one else*.

This clear and positive testimony in itself suffices to outbalance that of Nores (however respectable this witness be), which, on cross-examination, proved to be vague and indefinite, to lack substance and solidity, and, after all, nothing but hearsay.

It is unquestionable that had not Brulatour & Co. paid their debt with Carrière & Sons' check to Bertus & Durel, these could have sued them and would have had no right of action against Carrière & Sons.

We are satisfied that the evidence given by Bertus and corroborated by the surrounding circumstances, decidedly preponderates and justifies judgment in favor of the banks.

It is, therefore, ordered and decreed that the judgment appealed from be reversed, and it is now adjudged that plaintiffs' demand be rejected with judgment in favor of the defendants, with costs in both courts.

Rehearing refused.

No. 10,137.

MRS. R. A. MCNAIR VS. MRS. E. C. GOURRIER, EXECUTRIX, ETC.

In a suit in which the plaintiff makes claim for a definite sum invested as her share of the capital stock of a partnership, and also for another and indefinite sum as her share of the net profits thereof on final liquidation and settlement, a motion to compel her to elect will not prevail.

During the progress of the trial it is improper to appoint *ex parte* a single expert, when there is no professional opinion to be given on any question on the decision of which the case depends.

It is improper for the report of auditors to be admitted in evidence before it has been duly homologated. The proceedings for the homologation of the report of auditors constitute a trial of its accuracy and sufficiency to be admitted in evidence.

The appointment of a liquidator is one of those matters that must be left, in a great measure, to the sound discretion of the court.

A PPEAL from the Seventeenth District Court, Parish of East Baton Rouge. *Burgess, J.*

G. C. Bird and Kernan & Laycock for Plaintiff and Appellee.

B. N. Sims and Read & Goodale for Defendant and Appellant.

McNair vs. Gourrier, Executrix, etc.

I.

The opinion of the Court was delivered by

WATKINS, J. This is a suit for the liquidation and settlement of an alleged partnership and the adjustment of differences between the partners.

The plaintiff claims to be the surviving member of the firm styled Gourrier & McNair, and her suit is directed against the legal representative of her deceased associate, Clay Gourrier.

Her predeceased husband, Henry McNair, was a member of a firm, also styled Gourrier & McNair, which had been engaged for many years in the business of insurance agents, in the city of Baton Rouge. He died on the 22d of September, 1884.

She represents that thereafter she became a partner of the surviving member, Clay Gourrier, in a *new* business, of like character as the old one, which was to continue for one year from the 1st of October, 1884, and under the old firm name, Gourrier & McNair.

She claims to have put into this enterprise \$3125 as her proportion of its capital stock, which was to be first restored to her at its termination, and thereafter she was to receive one-half of the net profits of the business.

This partnership, she contends, operated a successful and prosperous business and realized large profits, aggregating \$3000 or more for her share.

In order that her interest be ascertained and the affairs of the partnership liquidated and settled, she prayed for the appointment of a liquidator, and, on suitable allegations, obtained the judicial sequestration of the books and other partnership property.

She asks judgment decreeing the restitution of her capital and for her share of one-half of the ascertained net profits of the business.

The defendant executrix denies the existence of the alleged partnership between the deceased and the plaintiff, but admits the existence of one between the deceased and Henry McNair, the plaintiff's husband, prior to his death.

She represents that McNair kept the books of that firm and had exclusive charge of the cash and its disbursement; that after his death, it was discovered that he had overdrawn his account, and had kept back funds belonging to the insurance companies whereby an indebtedness of \$12,000 had been created—a sum far in excess of the assets of the firm, and which endangered the personal estate of her deceased husband, Clay Gourrier, that of McNair being insolvent.

That her said husband caused an estimate to be made of the lowest

possible sum that was required to meet the immediate emergency and discharge the most pressing liabilities, and to thus protect the good name of McNair from dishonor; that it was ascertained to be \$3024 01; that her husband's defalcation was made known to the plaintiff and the amount required to meet and discharge it, and that she contributed that sum for that purpose.

Her contention, further, is that after the death of McNair the business of the firm of Gourrier & McNair was continued under the name and style of that partnership, by the surviving partner, Clay Gourrier, simply for the purpose of liquidating and settling up its affairs, and that its earnings were inadequate to reimburse and make good the additional deficiencies of McNair that were ascertained in the *interim*.

She prays the dissolution of plaintiff's sequestration and \$500 damages.

On these issues and pleadings the parties went to trial, and from an adverse judgment the defendant has appealed. In this Court the plaintiff has answered the appeal, and assigned as an error of the judge *a quo* the charge against her of \$243, being one-half a debt of the old firm of Gourrier & McNair, with which she is improperly debited, and from which she asks relief.

On the trial there were quite a number of witnesses interrogated in the presence of the court, and some under commission, and, as in many other cases, unfortunately, they made numerous unsatisfactory, conflicting and contradictory statements that are exceedingly difficult to reconcile with each other or harmonize with the theory of either party.

We shall not attempt to follow them or reconcile their differences—indeed, it would prove futile if we should—but will rest content with a simple recital of those facts that appear from the record to be well founded and exercise a material bearing on the case.

They are as follows, viz:

The firm of Gourrier & McNair was composed of Clay Gourrier, deceased husband of the defendant, and Henry McNair, deceased husband of the plaintiff, and they were engaged in business as insurance agents, with their domicile at Baton Rouge. It was dissolved by the death of McNair, on the 22d of September, 1884.

Soon after Gourrier ascertained that there were some debts that the firm owed, and among the number some that were due to different insurance companies for premiums that had been collected and not remitted. He caused an examination of the books to be made, and the amount was ascertained to be \$3024 01—i. e., the amount of the

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debts, the payment of which was pressing and immediately necessary, and not the gross sum, which was in excess of that—a sum which could not be presently realized out of the partnership assets, but which might be eventually collected therefrom.

Gourrier visited the plaintiff and represented to her this state of facts, and besought her assistance in making good this alleged shortage of her husband. She at first refused, assigning as a reason that her husband had requested her not to spend any part of her insurance money—\$10,000—in payment of his debts. But Gourrier was persistent in his entreaties, and exhibited to her the statement that he had caused to be made from the partnership books, and she, after consulting her friends, yielded her consent and gave him a check for the \$3024 01 that her husband was alleged to owe the insurance companies.

From the testimony of the *witnesses* we cannot precisely determine the object plaintiff had in view in furnishing this sum, but we think a fair preponderance of the *entire evidence* favors the theory that she advanced it to Gourrier for the purpose of enabling him to discharge the alleged confidential indebtedness of her deceased husband.

It is certain that she was in no manner personally bound for its payment, and that more than ordinary reasons influenced her to part with this to her large sum of money in disobedience to her husband's request. Doubtless, she believed that it was necessary to shield his good name from dishonor. But there is nothing in the record to justify the conclusion that it was intended by her as a gratuity, and a gratuity is never presumed.

Our opinion is that she intended it as an *advance* of money to the surviving partner of her husband's firm, with which he was to satisfy those urgent demands, and with the expectation of having it reimbursed to her out of its assets when a sufficiency thereof had been collected, and that she acted on her faith in his representations.

We are, further, of the opinion that, as an additional inducement to her to make this advance he proposed to continue the business of insurance agents under the firm name of Gourrier & McNair, for a period of one year from the 1st of October, 1884, and that they should participate in its profits equally.

We are, further, of the opinion that the plaintiff accepted this proposition, and that, in this manner, a new partnership was created between them. American Law Register, Vol. 27, p. 329, and authorities there cited.

The evidence discloses a good reason why such an arrangement

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should have been desirable to each of the parties, and that was, that by this means the credit and good-will of the old partnership could be utilized, so that a profitable business would be guaranteed for the future, and the collection of the assets of that firm would be better assured.

It does not appear from the evidence that the statement, on the faith of which the plaintiff made the advance, was correct. There is nothing to show in what way this money was applied, and it seems that Gourrier rendered her no account of it after he received it.

If, as we have concluded, this sum was advanced by plaintiff on the hypothesis that it was imperatively necessary to make *immediate* payment of certain confidential debts of her husband, she was entitled to have the evidence of their discharge when same had been satisfied.

Under the evidence the plaintiff is entitled to one-half of the net profits of the new partnership business when liquidated and ascertained, the date of its formation being fixed as the 1st of October, 1884, and the date of its dissolution as the 29th of September, 1885, the date of Gourrier's demise.

Plaintiff is also entitled to reimbursement of the money advanced from the sum realized from the assets of the old partnership—not to payment or return of it as capital from the net profits of the new firm—and to an accounting, by the decedent, of the assets of the *old* that were left in his hands at the time of dissolution, and of the entire business and affairs of the *new*, of which he had sole and exclusive management.

II.

The defendant filed a motion to compel the plaintiff to elect whether she would pursue her demand for the restitution of the \$3024 01 capital invested, or that for the liquidation and settlement of the partnership.

It has been repeatedly decided that partners have no cause of action against each other for a specific sum *resulting from a partnership transaction*, until there has been a settlement of the partnership. 21 Ann. 582, Sewell vs. Cooper; 21 Ann. 3, Succession of Dolhonde; 24 Ann. 391, Staunton vs. Buckner.

As previously stated, plaintiff makes claim for \$3125—as the amount of her share of the capital put in the new partnership—to be first withdrawn therefrom, and also for the settlement and liquidation of the business and affairs of the partnership and the recovery of one-half of the net profits thereof. Her demands are predicated on the dissolution of the partnership and payable out of its assets. In any

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event, they can certainly be considered as resulting from the partnership transactions.

But, viewing her case as we have construed it, no practical difference results, notwithstanding the two partnerships are, in some sense, involved. Their transactions were dual between the same parties, evidenced by the same agreement, and depend upon the same evidence. They are so completely blended as to form essentially one cause of action, which may be considered and decided in one suit. Their determination in this suit will inflict injury upon neither party, nor occasion inconvenience to either.

The motion was properly refused.

III.

During the progress of the trial an expert accountant was appointed to examine the books of the firm in which plaintiff claimed an interest, and he made a report which was admitted in evidence over defendant's objection and exception.

At a subsequent stage of the proceedings, auditors were appointed by the court, at the suggestion of defendant's counsel, to examine the books and accounts of the firm of Gourrier & McNair—i. e., the old firm, which, according to their theory, had been continued for the purposes of liquidation—and their appointment was opposed on the part of the plaintiff's attorneys.

The auditors made an examination of the books, and a report; but the latter was not homologated, and on that account its introduction in evidence was opposed by the defendant, though unsuccessfully, and a bill of exceptions retained.

We think it was error on the part of the judge to appoint a *single* expert *ex parte*, inasmuch as there was no professional opinion to be given on any question on the decision of which the case depended. C. P. 441.

It was likewise error on the part of said judge to admit in evidence the auditors' unhomologated report. C. P. 453, 456, 457.

The proceedings for the homologation of the report of auditors constitute a trial of its accuracy and sufficiency to be admitted in evidence. On such trial the court may rectify its errors, or order a new report. C. P. 458. This should be done, invariably, in case the account stated by the auditors between the parties is not sufficiently full, clear and succinct to enable the judge to intelligently and impartially determine their respective rights and interests.

Each of the parties have a perfect right to be heard *pro* and *con* on this question before it is admitted in the record as evidence.

"A report of auditors not homologated should not go to the jury." 2 Ann. 892, Reynolds vs. Rowley.

The judge cannot arbitrarily sustain or dismiss an opposition to the report. "He must try it summarily on its merits, and hear evidence on such questions of fact as it distinctly puts at issue." 12 Ann. 183, Thompson vs. Parisot; C. P. 456.

Inasmuch as we have arrived at a different solution of the questions at issue from that by the judge *a quo*—in greater part—the report of the auditors as made would not meet the present exigencies of the case in any event. It was improperly admitted in evidence.

IV.

The judge of the court below, considering the report as evidence, arrived at the conclusion that the statement of the partnership accounts was sufficiently accurate to enable him to render a final judgment liquidating the affairs of the *new* partnership, to which it was confined; and he did not find it necessary to appoint a liquidator, as prayed for by the plaintiff.

There appears to be a large amount of assets that have been either uncollected or unaccounted for. There is no prayer in either petition or answer for the sale or division in kind of the partnership rights and credits, and they cannot be treated as cash, and, as such, used in settlement. Some disposition must be made of them before a liquidation and settlement of the partnership can be effected.

The appointment of a liquidator may be deemed necessary in order to effect their collection, if considered available; or, if not, to make a judicial sale of them.

But these questions are for the consideration of the lower court. The appointment of a liquidator is one of those matters that must be left in a great measure to the sound discretion of the judge. 11 Ann. 260, Pratt vs. McHatton.

On the whole, it is necessary that the case be remanded to the court *a qua* for a new trial, to be therein restricted to the issues not determined in this opinion and decree.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed; and it is further ordered, adjudged and decreed that the plaintiff do have and recover one-half of the net profits of the business of the *new* firm of Gourrier & McNair from the 1st of October, 1884, to the 29th of September, 1885, on final liquidation and settlement thereof.

Cazes vs. Succession of Gassie et als.

It is further ordered, adjudged and decreed that the plaintiff do have and recover the sum of \$3024.01 out of the moneys collected from the assets of the *old* firm of Gourrier & McNair on liquidation and final settlement contradictorily had in the suit.

It is finally ordered, adjudged and decreed that the demand of plaintiff for the restitution of \$3125, capital invested, be rejected; that all other issues in the suit remain undetermined until a new trial is had in the court *a qua*, and that, for this purpose, the cause is remanded—further proceedings to be taken in pursuance of the views herein expressed.

The costs of appeal are to be paid by plaintiff and appellee, and those of the lower court to await the final determination of the cause therein.

ON APPLICATION FOR REHEARING.

A careful re-examination of this case has led us to the conclusion that there is only one amendment necessary to be made in our opinion, and that is in reference to the date at which the *business* of the *new* partnership of Gourrier & McNair terminated. In the opinion it is fixed at the date of Gourrier's death, on the 29th of September, 1885. There is evidence in the record going to show that the *business* was continued until some time in November following. We think that the ends of justice would be best subserved by leaving this question open for the determination of the lower court.

It is, therefore, ordered, adjudged and decreed that our former decree be so amended as to leave the date at which the *business* of the *new* firm of Gourrier & McNair terminated open for the ascertainment of the judge *a qua* on the new trial of the cause; and that, as thus amended, the same remain undisturbed.

Rehearing refused.

No. 10,118.

BERTRAND CAZES VS. SUCCESSION OF AUGUSTE GASSIE ET ALS.

Real estate which cannot be conveniently divided in kind must be sold to effect a partition thereof.

A PPEAL from the Twenty-third District Court, Parish of West Baton Rouge. *Talbot, J.*

Alex. Hébert for Plaintiff and Appellee.

Samuel Matthews for Defendants and Appellants.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is a suit in partition of certain property owned in common by the plaintiff with a widow in community and her minor children and another party, and of other property likewise owned in community, but with said widow and tutrix only.

The plaintiff claims that the property can be divided in kind, except the sugar-house, etc., which, it is admitted, necessarily must be sold.

On the other hand, the defense is that the remaining property cannot be divided in kind without loss and injury, and that it must likewise be sold to effect the partition.

The district judge thought with the plaintiff, and rendered judgment directing the partition to be made in kind, allotting part of the realty to the plaintiff and part to the widow and tutrix and ordering the sale of the sugar-house, etc.

The defendants appeal from the judgment thus rendered, and plaintiff answers asking an amendment—a money allowance.

We find no plan in the record showing the location of the buildings on the land sought to be partitioned, and are not convinced by the proof adduced that the partition can be made conveniently in kind.

The very witnesses who affirm that the property can be thus divided, declare that a line dividing the land equally would leave more buildings on one tract than on the other. They add, however, that the buildings can be rolled and any inequality can be compensated in money.

There exists considerable and almost irreconcilable discrepancy in the testimony touching the value of those buildings and the cost of removal; the appraisement rising to \$2550, the average being \$850.

The valuation put on the whole land in the inventory is \$3000.

When the worth of the land and that of the buildings, the trouble and inconvenience to which the parties would be driven in order to dispose the buildings so as to make the two halves of the land as far as possible equally valuable and the sum which eventually may have to be disbursed to equalize the lots,—are considered, the conclusion is irresistible that plaintiff's theory, for a division in kind, is not practicable without injury. R. C. C. 1340; 34 Ann. 969; 39 Ann. 805; 5 Ann. 208.

It is apparent that the only safe way in which the differences of the parties can be fairly adjusted, with full justice to all concerned, among whom are minors, is to have the land and the sugar-house, etc., sold on such terms as may be fixed by those interested.

It is unnecessary to pass upon plaintiff's motion for an amendment

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of the judgment. He asks that a certain sum be allowed him, which is not embraced in the prayer of the petition and is not at issue. It cannot presently be considered, as it may hereafter form the object of a demand of payment out of the proceeds of sale by due proceedings and at the proper time.

The petition contains an averment that, in the sale by plaintiff of the undivided half of the land, which presently belongs to the widow and tutrix, he had reserved to himself and wife for their lives, the use of certain buildings and surroundings; but the petition does not ask judgment on that subject. It simply prays for a partition.

Besides, it appears that a material portion of the property has, more or less, been lost by excavation and otherwise and the right is waived in the brief.

It is, therefore, ordered and decreed that the judgment appealed from, as far as it directs the sale of the sugar-house, etc., be affirmed, and that in other respects it be reversed; and it is now ordered and decreed that the real estate described in the petition and which had been directed to be partitioned in kind be sold at public auction, after compliance with all legal requirements, by the Sheriff of West Baton Rouge Parish, or such other competent officer as the parties may designate, and on such terms as they may respectively fix, the proceeds to be distributed among them according to their rights and according to law, and that the costs in both courts be paid by the litigants in proportion to their relative shares.

Rehearing refused.

No. 10,123.

MRS. VARINA B. GAITHER VS. T. K. GREEN, TAX COLLECTOR, ET AL.

The minutes of the proceedings of the Board of Commissioners of the Fifth Levee District, wherein a five mill district levee tax appears to have been levied, are to be taken as of unquestionable verity, and are not to be attacked, and proof entered into, in a collateral proceeding to which said commissioners are not made parties, to show that they are false.

Parol evidence, in a collateral action, cannot be received to contradict the records of a public corporation, which are required by law to be kept in writing, or to show a mistake in the matters therein recorded.

If such record be false, and the corporation will not correct it, a party interested may, by mandamus, compel it to make correction so that it may conform to the truth.

Mandamus will not go to the Board of Commissioners after the levy of the tax has been completed, the tax has been extended on the assessment roll, and the roll placed in the possession of the tax collector for collection, because it would be nugatory for want of power in such board to make the correction that is required, it being *functus officio*.

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117	979
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122	1093

Gaither vs. Tax Collector et al.

The law confided the levy, assessment and collection of the special tax in question to three distinct and different sets of officials:

1. Its levy to the Board of Levee Commissioners.
2. Its extension on the parish assessment rolls to the parish assessors.
3. Its collection to the State tax collectors.

Once a tax is *in esse*, the tax roll placed in the hands of the tax collector, and the levying and assessing officers have become *functus officio*, the legality of such tax cannot be tested with the collector alone.

In case there be difficulty in interpreting the qualifying words of a sentence, the rule is to apply them to such *other* words or phrases as shall immediately precede them therein, rather than to those more remote.

Taxes levied under the authority of act 33 of 1879, and not collected prior to the passage of Act 44 of 1886, were not abrogated thereby. They were preserved and kept in force after the passage of the latter, by virtue of the saving clause contained in section 9 of said act.

A collateral inquiry into the legality of a tax levy, or assessment, apparently *legal* and *valid* on its face, cannot be entertained in an injunction suit against the tax collector alone, and after the levying or assessing officers have become *functus officio*.

Such an inquiry may be gone into and determined in such a suit in case the levy, or assessment is *void* on its face, or made in plain violation of some provision of the constitution or law.

A PPEAL from the Ninth District Court, Parish of Concordia.
Young, J.

Conner & Conner and *J. N. Luce*, for Plaintiff and Appellee.
Steele, Garrett & Dagg, for Defendants and Appellants.

The opinion of the Court was delivered by

WATKINS, J. The questions raised in this case are the legality and constitutionality of the five mill district levee tax that was levied in 1886 for the Fifth Levee District.

The plaintiff's contentions are:

First.—That if the tax is claimed to have been levied by the Commissioners of the Fifth Levee District at a meeting alleged to have been held on the 22d of January, 1886, at Delta, Louisiana, it is null and void because there was, in point of fact, no such meeting held, and no such tax levied; but that three members of said Board of Levee Commissioners did meet at *Vicksburg, Mississippi*, on the night of the said 22d of January, and then and there attempt to levy this pretended, false and fraudulent tax.

Second.—That if the legality of said levy be conceded in this respect, then it is null and void, because act 33 of 1879, creating the Fifth Levee District, was repealed by act 44 of 1886, and such taxes as may have been levied under the former, and not collected prior to

the passage of said repealing act, were thereby abrogated, and their collection cannot be now enforced in consequence thereof.

Third—That if said tax was levied by the General Assembly in section 8 of said repealing statutes, it is unconstitutional and void, because said section, thus construed, violates articles 203 and 214 of the Constitution.

On the trial, the district judge held that the tax which was levied by the Commissioners of the Fifth Levee District on the 22d of January, 1886, was abrogated by reason of the repeal of the law, under the authority of which the levy was made; that, in so far as section 8 of the repealing statute was intended to operate as levy of said five mill tax by the General Assembly, the law was unconstitutional, and could not be enforced; and from a judgment annulling the tax and perpetuating plaintiff's injunction, the defendant has appealed.

I.

The official minutes of the proceedings of the Board of Levee Commissioners show, that they levied the tax in question at a meeting, duly convened and held at Delta, Louisiana, on the 22d of January, 1886.

Plaintiff's counsel sought to impeach this record with *parol* evidence, but the introduction of it was successfully resisted by defendants, on the grounds, viz:

First—That the official minutes of the board constitute a public record which imports absolute verity on its face, and same cannot be contradicted by *parol*, nor attacked in collateral proceedings to which said commissioners are not made parties.

Second—But, if *parol* proof be deemed admissible, that F. S. Shields was not a competent witness by whom to prove its falsity, because he was a member of the board and attested the genuineness and correctness of said minutes as the secretary of the board.

It is elementary that *parol* evidence cannot be received for the purpose of impeaching or contradicting the records of judicial proceedings and the decrees of courts; nor for the purpose of explaining or amplifying a legislative or congressional enactment; and it is contended, on the part of the defendant, that a similar protection is thrown around the proceedings of such political or municipal corporations as the Legislature may create.

But, in our view of this question, it cannot be examined and decided

in this collateral way, and in a suit to which the commissioners, who levied the tax, are not made parties.

It is so held by Judge Cooley in his treatise on taxation in the following terse and apposite language :

"It is generally held that the returns and certificates required of an officer, in the performance of official duty, are to be taken in the proceeding in which they are made, as of unquestionable verity. They are not to be attacked, and proof entered into, in a collateral proceeding, to which the officer is not a party, to show that they are false." Cooley on Taxation, p. 195.

This principle is in consonance with the views expressed by Mr. Justice Dillon on the subject:

"*Parol evidence*, in a collateral action, cannot be received to *contradict* the records of a public corporation, required by law to be kept in writing, or to show a *mistake* in the matters therein recorded.

"The remedy is to have him (the officer), if in office, to correct the record according to the truth." 1 Dillon's Munic. Corp., Sec. 236.

This opinion is maintained by the courts of our sister States, and the following quotation is selected from a leading case in Connecticut :

"If a town corporation makes an erroneous record of its proceedings, this cannot be contradicted in a collateral action.

"In such action the record is conclusive. If *false*, and the corporation will not correct the record, a party interested may, by *mandamus*, compel it to make the correction." Boston Turnpike Company vs. Pomfret, 20 Conn. 500.

But even *this* remedy must be seasonably applied.

It will be too late to resort to *mandamus* after the officers of the board, or corporation, have become *functus officii*.

On this subject Mr. High says :

"*Mandamus* will not go to a board of supervisors, requiring them to make corrections in the assessment of taxes for the county, after the assessments have been completed, and warrants have been issued to the receiver of taxes, and the matter has passed beyond the control of the supervisors, since the writ would be nugatory if issued, and the rule is well established that *mandamus* will never issue when it would be nugatory, from want of power in the respondent to perform the act required." High's Ex. Legal Rem., Secs. 140, 141.

This agreement, in opinion of text writers of first ability, appears to our minds conclusive and their reasoning irresistible.

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It is equally clear to our minds that this is a collateral proceeding—a third opposition, coupled with an injunction against the enforcement of the tax, and wherein the tax collector is the *sole* defendant.

The Legislature required the commissioners to *levy* the tax “payable on the assessment roll” of each current year. Sec. 8 act 33 of 1879.

It imposed upon them no other duty. That duty is separate and quite distinct from that imposed on the assessor.

The law has confided the levy, assessment and collection of the special tax in question to three sets of officials:

1. Its levy, to the Board of Levee Commissioners.
2. Its extension on the assessment roll, to the parish assessor.
3. Its collection, to the State tax collector.

There is, between their respective duties, a line of demarcation that is well-defined and clear.

It is essential to the validity of the tax that proper and legal proceedings should be taken in its levy and extension on the assessment roll, because it is through the correct performance of the duties assigned that the tax is brought into existence. But once *in esse*, and the tax-roll placed in the possession of the collector, the levying and assessing officers cease to have any relation to the tax, and are *functus officii*.

At this stage the legality of neither the levy nor the assessment can be tested by either injunction or mandamus, directed against the collector alone.

This contention of the plaintiff cannot be sustained, and the district judge decided correctly.

II.

Act 44 of 1886 only purports to repeal, in express terms, that portion of act 33 of 1879 which *creates* the Fifth Levee District, and it purports to create in lieu thereof the Fifth *Louisiana* Levee District. Additional territory was given to the new district, and provision was made for the appointment of other commissioners to take charge of, and administer its affairs. It is clear, then, from this statement, that, in all other respects than the one first mentioned, said act 33 remains in force, and has effect, except in so far as its provisions are *inconsistent* with those of said repealing law. 39 Ann. 439, *State of Louisiana vs. Natal*; 93 U. S. 266, *Broughton vs. Pensacola*.

On this hypothesis the plaintiff *must* place her reliance in establishing the abrogation of the tax upon an implied, and not on an express, repeal of the law.

In opposition to her contention defendant's counsel attracts attention to the saving clause contained in section 9 of the repealing act, and which is couched in the following words, viz :

"That nothing in this act shall deprive *this* district of its share of the General Engineer Fund, and that all taxes *hereafter collected* on the rolls of the Fifth Levee District, as now existing, shall be transferred to the credit of the Fifth *Louisiana* Levee District," etc.

He relies on this clause as protecting the tax.

His theory is, that this provision of the statute, directing that "all taxes *hereafter* collected on the rolls of the Fifth Levee District * * shall be transferred to the Fifth *Louisiana* Levee District," of necessity implies, and presupposes the continued existence and enforceability of such taxes.

But a different construction has been placed upon it by the judge *a quo*, and which, in substance is, that the phrase "as now existing" refers to the rolls, and not to the Fifth Levee District; and he argues therefrom that, if the taxes thereafter collected on the rolls, as then existing, are alone to be transferred to the credit of the *new* district, the tax in question was not embraced in its provisions, from the fact that, on the 2d of July, 1886—the date said act 44 was signed and promulgated—it had not been extended on the assessment rolls of that year.

But we are of opinion that the quoted clause is not susceptible of such construction.

In case there be difficulty in interpreting the qualifying words in a sentence, the rule is to apply them to such *other* words or phrase as shall immediately precede them therein, rather than to those more remote.

To apply the phrase "as now existing" to the word "rolls," in the sense of the opinion of the judge *a quo*, necessarily involves the complete elision of the phrase "of the Fifth Levee District," and thus results in the entire reformation of the sentence.

We do not feel ourselves at liberty to do this.

The language, as employed in the legislative enactment, is a mandate unto us; and we cannot consent to any construction of it that would do violence to its letter or spirit; but, in thus expressing our opinion, we do not mean to criticize the views expressed by our learned brother of the lower court, for whose opinion we entertain a high regard.

In our view, the plain significance of the clause under consideration is, that all taxes which had been levied by the Commissioners of the

Gaither vs. Tax Collector et al.

Fifth Levee District *antecedent* to the passage of the repealing statute, and which might be *subsequently* collected on the rolls of that district as that district existed when said repealing statute was enacted, should be transferred to the credit of the Fifth *Louisiana* Levee District.

Instead of abrogating the taxes which had been levied under the law of 1879, it was the clearly expressed intention of the Legislature to leave them in *proprio vigore*. Had such not have been the legislative intent, this guarded phrase would not have been employed, but another, that would have been unmistakable in its terms.

The tax in question was not abrogated by the provisions of Act 44 of 1886, and in this respect the opinion of the district judge was in error.

III.

The views expressed in the preceding paragraph render it unnecessary for us to pass upon the constitutionality of Section 8 of Act 44 of 1886, whereunder it is suggested that the *General Assembly has levied* a five mill district levee tax.

The plaintiff's proposition, as we take it, is stated and argued in the alternative that we should decide—with the district judge—that the tax in question was abrogated, and attempted to be replaced or supplied by this legislative tax.

As the former exists and may be enforced, there is no room for such an hypothesis, and the construction of the act is not drawn in question and it was error of the judge *a quo* to so decide.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from be reversed, the demands of the plaintiff rejected, her injunction dissolved, and all costs of both courts taxed against her.

ON APPLICATION FOR REHEARING.

Plaintiff and appellee complains of our opinion on several grounds.

First—That it holds parol evidence to be inadmissible in a collateral proceeding to which the levee commissioners were not made parties—a ground of objection not taken in the lower court by defendant's counsel.

Possibly this *precise* objection was not urged in the court *a qua*; but plaintiff's counsel evidently considered that it was, as his brief on the hearing of the case will attest. Indeed, we selected therefrom some of the most pertinent authorities that are cited in the opinion.

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Second—That the following enunciation of the opinion, viz: "But once (the tax) *in esse*, and the tax roll placed in the possession of the collector, the levying and assessing officers cease to have any relation to the tax and are *functi officii*. At this stage the legality of neither the levy nor the assessment can be tested by either injunction or mandamus directed against the collector alone," is opposed to the settled jurisprudence of this Court; and, in proof of this assertion, he cites the following cases, viz: 36 Ann. 801, Cobb vs. McGuire, tax collector; 36 Ann. 804, Enault vs. McGuire, tax collector; 36 Ann. 960, Budd vs. Houston, tax collector; 35 Ann. 996, Jones vs. Rains, tax collector; 33 Ann. 833, Surgett vs. Chase, tax collector; 33 Ann. 843, Brown vs. Houston, tax collector; 30 Ann. 1086, Gonzales vs. Lindsey, tax collector.

A simple glance at the opinions referred to will demonstrate the error counsel has fallen into. The legality *vel non* of the levy of the tax under consideration in this case, is *dehors* the proceedings of the Board of Levee Commissioners, exclusively. If there is any, the illegality is *intrinsic*. On the contrary, the illegality of the tax under discussion in the quoted cases was either fundamental or *extrinsic*. It was apparent upon the face of the tax record, or raised on the law.

In 30 Ann. 1085, Gonzales vs. Lindsey, the objection urged to the tax was that the levy was in excess of the *rate* of taxation permitted by law.

In 33 Ann. 833, Surgett vs. Chase, the question was the constitutionality *vel non* of a twenty mill levee tax, it being in excess of the ten mill limitation.

In Brown vs. Houston, 33 Ann. 843, the question was whether a tax on a lot of Pennsylvania coal, on sale in New Orleans, was in contravention of the United States Constitution.

In Jones vs. Raines, 35 Ann. 996, the plaintiff claimed the nullity of a tax levied on a saw-mill, on the ground that it was exempt under Article 207 of the Constitution, as property employed in the manufacture of wood.

In Enault vs. McGuire, 36 Ann. 804, a similar question was raised as to the exemption of a certain alleged place of public worship.

Cobb vs. McGuire, 36 Ann. 800, was dismissed, because this Court was without jurisdiction.

In Budd vs. Houston, 36 Ann. 959, the tax collector and recorder were enjoined from placing a tax title on record, on the ground that there existed, in the proceedings leading up to the sale, certain "rad-

Gaither vs. Tax Collector et al.

ical defects" which were not enumerated in the opinion. But enough can be gleaned from it to show that the *acts* of the tax collector were directly assailed.

The mooted question was the authority of the tax collector to stand in judgment for the State.

The plaintiff was appellant from a judgment dismissing the suit, on the ground that her petition disclosed no cause of action.

The Court held that "it is well settled that when an officer is proceeding to collect a State tax *illegally*, either on account of a *void* assessment or irregularity in the *mode* of collecting, * * * the proceedings may be arrested by injunction in a suit against the officer alone."

There is no question, in our minds, of the correctness of the views expressed in those cases; and there is nothing in the opinion we have quoted from that militates against our opinion in the instant case. Its object and purpose were to decide that a *collateral* enquiry into the legality of a tax levy, apparently legal, and valid on its face, could not be gone into, in an injunction suit, against the tax collector alone. It was *not* the object or purpose of the opinion to hold that a levy, or an assessment *void* on its face, or in plain violation of the Constitution or the law, could not be tested in such a suit, and with the tax collector alone. The fact that, notwithstanding the views we entertained on this branch of the case, we entertained and decided the controversy in relation to the *legality* of the tax, is conclusively against plaintiff's hypothesis.

Third—That it erroneously holds that this is a collateral attack on the proceedings of the levee board.

In support of this contention her attorney cites the following cases as defining what is a collateral attack, viz: 36 Ann. 844, Gerac vs. Guilbeau; 35 Ann. 893, Ludeling vs. McGuire; 29 Ann. 112, Lannes vs. Workingmen's Bank; 30 Ann. 871, Workingmen's Bank vs. Lannes.

The first three of these cases were injunction suits restraining sheriffs' sales, at the instance of creditors of tax delinquents, of property in the possession of purchasers at tax sales, under recorded tax titles; and the same were perpetuated on the ground that the validity of tax titles could not be tested in such collateral way.

The last of the four was a direct action. The views expressed in each of those cases meet our unqualified approbation. They are only illustrations of what are collateral proceedings, and do not conflict with the views expressed in our opinion herein.

Fourth—That the opinion was in error in assuming that the plain-

Insurance Company vs. Board of Assessors et al.

tiff's property was under seizure. This may be true; but there is an allegation in her petition to the effect that demand had been made on her by the sheriff for the payment of the tax complained of, and she was advised that if she did not pay the same her property *would* be seized and sold in satisfaction thereof.

In view of this averment, we must confess our surprise at the statement in counsel's brief that "no property had been *seized*."

There is no practical difference between an *actual* seizure and one that is apprehended.

But, if his intimation were correct, this would be an hypothetical case; and it is hardly to be believed that he would *insist* upon that view being entertained by us.

Fifth—That if the five mill tax, levied by the Commissioners of the Fifth Levee District for the year 1886, is maintained, plaintiff's property will be subjected to a double tax, inasmuch as, under Act 44 of 1886, creating the Fifth *Louisiana* Levee District, the General Assembly levied a five mill tax for the same year.

Hence, it is argued that our opinion is in error in holding the former valid, as the latter necessarily excludes it; or, if the former be maintained the latter must be invalidated.

As we understood plaintiff's petition, it was aimed at *the* five mill tax that was levied by the commissioners on the 22d of January, 1886; and the constitutional power of the Legislature to levy the tax indicated in Act 44 of 1886, was drawn in question, only in the alternative that we should hold the former was not enforceable. It was manifestly the intention of the plaintiff to resist the collection of but *one* tax, and our opinion was properly limited to its consideration.

Rehearing refused.

No. 10,077.

MERCHANTS' MUTUAL INSURANCE COMPANY VS. BOARD OF ASSESSORS,
ET AL.

Neither the State nor the city of New Orleans can be required to give an appeal bond.

The State Tax Collector and the Board of Assessors are State functionaries, and their appeal is the appeal of the State, and no bond is necessary to perfect it.

Sec. 13 of Act 96 of 1882, which provides for the filing by each taxpayer of a list of his property, to be delivered to the assessor, is not mandatory. It provides no penalty for non-compliance, and cannot produce the effect of shutting out the taxpayer from all relief, owing to his omission.

It is unnecessary to adduce evidence to justify an assessment apparently legally made. It stands until it is shown to be erroneous by satisfactory proof.

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Insurance Company vs. Board of Assessors et al.

Assessors ought not to permit assessments to be made by others. Their sworn duty is to value the property themselves.

The rule is well settled as regards corporations, that they are liable to assessment only for the excess of the market value of their capital stock over and above that of its tangible property otherwise assessed and taxed.

Satisfactory proof that an assessment of the taxable property of a corporation is unwarranted and excessive, justifies a reduction to a reasonable amount.

A PPEAL from the Civil District Court for the Parish of Orleans.
Tissot, J.

W. S. Benedict for Plaintiff and Appellee.

W. H. Rogers, City Attorney, and *Wynne Rogers*, Assistant City Attorney, for Defendants and Appellants.

ON MOTION TO DISMISS.

The opinion of the Court was delivered by
TODD, J. This is a suit for the reduction of assessment on the property described in the petition.

The city of New Orleans, the State Tax Collector and the Board of Assessments were made defendants.

There was judgment in favor of the plaintiff, from which the defendants appealed.

The motion to dismiss the appeal is, substantially, on the ground that there is no bond of appeal filed and none required by the order of appeal.

It is evident that the real and only parties in interest in this litigation are the plaintiff and the State and city of New Orleans. The Tax Collector is a State official and the Board of Assessors a State functionary. Neither the State nor the city of New Orleans are required to give an appeal bond; they are expressly exempted from any such requirement, and as the defendants are representatives of one or the other, there is no significance whatever in the omission of such bond.

The motion is, therefore, denied.

ON THE MERITS.

BERMUDEZ, C. J. This is a proceeding for a reduction of assessments of property, as excessive and illegal.

From a judgment making the reduction this appeal is taken.

The evidence shows that seasonable application was made for the reduction, but that it was not allowed. On appeal to other authority no relief was had.

It is established by the president, the secretary and the cashier of

5-10-1907

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the company that the statement which they handed is a correct exhibit of the taxable property of the corporation and of the value thereof.

The stock was assessed at its cash or market value, 55 on a par value of 100—\$330,000. After deduction of the real estate, etc., \$223,000, and of various stocks owned in different corporations, \$41,000, the balance was \$65,000, all in round figures.

This would appear to be sufficient to justify the relief asked.

The defence, however, in the shape of a peremptory bar, is that the plaintiff has not complied with Section 13 of Act No. 96 of 1882, which provides for the filling out by each taxpayer of a list of his property.

It may be that this direction was not followed, but to the omission the law has attached no penalty. The provision is not mandatory, and failure to comply with it cannot have the effect of shutting out plaintiff from the relief asked.

The rule is well settled that corporations are liable to assessments only for the excess of the market value of their capital stock and above that of its tangible property. 31 Ann. 475; 3 Ann. 20; 34 Ann. 618.

It is also well established that assessments legally made are *prima facie* correct, and stand until shown to be erroneous by substantial evidence.

There was, then, no necessity for the defence to have shown how and why the assessments were made in this case, unless in rebuttal; but the testimony of the witness produced proves that he, a mere clerk, made the assessments, which afterwards were accepted and placed upon the rolls.

It may well be here to observe that assessors ought not to permit assessments to be made by irresponsible parties, when the law imposes that duty upon them, and they have sworn to perform it.

That testimony shows the ways and means by which the witness arrived at the valuation of the taxable property of the plaintiff corporation. They are clearly at variance with the law and do not realize the true condition of things. Even were that testimony lucid and intelligible, which it is not, far from supporting, it would only be destructive of the assessments complained of.

The district judge correctly found that the reduction asked was reasonable and proper, and, adding to the net value of the stock that of the real estate, concluded that the total of assessment should be \$288,683 50, and that the tax thereon should be accepted without interest or penalty.

Judgment affirmed.

Why is it not a penalty?
See Act 9 of 1878
52nd.

Dearmond vs. St. Amant.

No. 10,108.

JOSEPH DEARMOND VS. JOSEPH ST. AMANT.

In this action for malicious prosecution the evidence fails to establish that the defendant acted with malice and without probable cause, which are essential to support such a suit.

A PPEAL from the Twenty-second District Court, Parish of Ascension. *Duffel, J.*

R. N. Sims and E. N. Pugh for Plaintiff and Appellant.

White & Saunders and R. McCulloch for Defendant and Appellee.

The opinion of the Court was delivered by

FENNER, J. This is an action for defamation of character and malicious prosecution.

The defamation of character alleged consists merely in making public statements that plaintiff was guilty of the crime for which he was arrested and prosecuted upon the affidavit of defendant. Manifestly the slander is merged in the prosecution, and if the prosecution is not actionable, neither is the slander.

The record shows that an attempt was made in the night time to burn down defendant's store. It was a palpable attempt at deliberate arson, only thwarted by a fortunate discovery and alarm in time to extinguish the flames.

Arson is one of the most dangerous and cowardly of all crimes, and none is calculated to impress its victim with a deeper sense of alarm and insecurity. It was natural that defendant should have been anxious to discover and punish the perpetrator of such a crime.

He employed a professional detective in New Orleans and brought him to the parish to aid him in ferreting out the criminal. Evidence was obtained pointing to one Joseph Guédry as the guilty person, and he was arrested and confined in the parish jail.

While so confined he made to the sheriff a most circumstantial confession to the effect, substantially, that he had been engaged by plaintiff to burn the store; that they had gone together and set fire to it; that Dearmond had told him that a mercantile rival of defendant had promised to give \$1500 for the burning of defendant's store; that plaintiff had gone early next day to the rival's store to claim the reward, but that the merchant had refused to pay, because the attempt had not succeeded.

This confession, repeated several times, was communicated by the

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44 988
40 374
45 1270
40 374
48 338
40 374
52 1023
52 1025
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108 307
40 874
111 335
40 874
117 677

Dearmond vs. St. Amant.

sheriff to the defendant and also to the district attorney, and, after consultation between the three, it was determined that plaintiff should be arrested. The district attorney prepared an unqualified affidavit charging plaintiff with the crime, but defendant declined to make it in that form, saying that he could only swear from information received and not of his own knowledge; whereupon the affidavit was so changed, and defendant made oath to it before the judge, who issued his warrant for the arrest of plaintiff.

Unwilling, however, to have the arrest made without further inquiry, the defendant asked time to make such, and it was determined that the warrant might be held subject to his discretion, after further investigation. Defendant thereupon engaged another detective from New Orleans to assist him in further investigations. After several days thus employed, resulting in the discovery of various circumstances tending to confirm the confession of Guédry, the arrest was made by defendant and the detective, to whom the sheriff had given the warrant, and plaintiff was incarcerated.

It turned out that Guédry's confession had been obtained by the sheriff under threats of the certainty of his conviction and under promises that if he would tell all he should be set free. Of course, such confession was inadmissible as evidence for any purpose, and upon the preliminary examination before the judge Guédry was discharged.

On the following day the district attorney entered a *nolle prosequi* in the case of plaintiff and he was discharged, after a confinement of about one week.

Neither defendant nor the district attorney was informed of the threats and promises by which the confession of Guédry was obtained.

The sheriff admits that, after getting the confession, he suggested to defendant to make an affidavit against plaintiff. The district attorney states that, having no reason to doubt its truth, he "considered that confession alone sufficient for him to advise the affidavit and warrant."

If plaintiff is innocent of this heinous charge, as the law presumes him to be, he has undoubtedly suffered a great wrong; and for him to be compelled to bear it without redress is, indeed, a hardship, but it is one of those sacrifices which the individual is required to make to the interests of society. It is not only the lawful right, but the civil duty of every citizen, to set on foot criminal proceedings whenever he believes honestly and on reasonable grounds that a crime has been com-

 Heirs of Dohan vs. Murdock.

mitted. The social interests require, and the law invites him thus to aid the State in the discovery and punishment of crime; and it would be equally unjust and impolitic to make him a guarantor of the success of the prosecution, or to make its failure an actionable wrong.

Hence, the law wisely holds the prosecutor harmless in such a case, notwithstanding the acquittal of the person accused, unless his conduct has been tainted by two concurrent vices: 1. Malicious motive. 2. Want of probable cause, *i. e.*, absence of reasonable grounds for believing in the truth of the charge made.

From the huge volume of testimony in this case we have selected and detailed a few of the pertinent and indisputable facts, the effect of which is not, in our judgment, destroyed by any others of the numerous facts and circumstances proved. It would serve no useful purpose to discuss the latter. Suffice it to say that the record fully satisfies us that the defendant acted throughout in good faith, from honest motives, on probable and reasonable grounds, and without malice, express or implied.

It is, therefore, ordered, adjudged and decreed that the verdict and judgment appealed from be annulled and set aside, and that there be now judgment in favor of defendant, rejecting the demand of plaintiff, at the latter's cost in both courts.

 No. 10,120.

HEIRS OF REBECCA DOHAN VS. ROBERT MURDOCK.

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52 1303
40 376
111 329

The recitals contained in a deed that is offered in evidence in proof of title, cannot be considered as evidence of the domicile of the parties when it is a necessary element of title. In this case their domicile should be affirmatively proved.

A PPEAL from the Ninth District Court, Parish of Tensas.
Young, J.

Wade H. Young for Plaintiffs and Appellees.

Steele Garrett & Dagg for Defendant and Appellant:

1. In a petitory action the claimant must allege and prove every material fact necessary to establish good and perfect title in himself before he can recover. C. P. 44.
2. The whole burden of proof is upon the plaintiff in a petitory action. He must make his title certain; to make it possible, or even probable, will not suffice. C. P. 44; 22 Ann. 378; 19 Ann. 121; 18 Ann. 29, 507.
3. The rule that evidence received without objection will be given effect even where the issue is not made by the pleadings will not be extended so as to permit the record of a deed which is offered and received for the purpose of showing the conveyance of title—to have the effect of proving residence or domicile of the parties, or where there is no such averment in the pleadings. *Jones vs. Real*, 1 Ann. 300.

Heirs of Dohan vs. Murdock.

4. Words of description used in notarial acts or judicial proceedings not necessary to the purposes of contract, or to the jurisdiction, do not make proof of domicile, and this rule has greater force where the deed or contract is by private act and not signed by the party whose domicile is sought to be shown by it. *New Orleans vs. Shepard*, 10 Ann. 268.
5. A possessor in good faith is one who holds title translatif of property, and has just cause to believe himself to be the master of the thing which he possessed. C. C. 3451.
6. The possessor in good faith cannot be required to account for the revenues received before any claim for restitution is made, and he is entitled to be reimbursed the expenses he has incurred upon the property before he can be evicted from it. C. C. 4453.

The opinion of the Court was delivered by

WATKINS, J. This is a petitory action for the recovery of an undivided one-half interest in the property known as the Ashland plantation, situated in the parish of Tensas, this State. It is designated in the petition as "the same property (that was) sold by William Harris to Daniel J. Dohan and to Mrs. Rebecca Dohan on the 21st of February, 1850."

Plaintiffs claim the property by inheritance from their deceased mother, Mrs. Rebecca Dohan, and it is alleged in their petition that one of them is a resident of the State of Texas and the others of the State of Mississippi.

They represent that the defendant has taken possession of their said one-half interest "without authority from them," and has used and cultivated same, and that the annual revenues thereof aggregate \$5000 *per annum*.

The answer of the defendant is, in substance, that he is in possession of the whole property, but disclaims title to more than one undivided half interest thereof. That he acquired said interest by purchase from Daniel J. Dohan by deed of record and date July 15, 1878, and possessed the remaining one-half as the tenant at will of "Michael J. Dohan, residing in Philadelphia, Pennsylvania."

He represents that he purchased said property in good faith, for full value, and upon the written opinion of a reputable attorney at law that the title was perfect.

There is in evidence a deed from William Harris to Daniel J. Dohan and his wife, Rebecca Dohan, purporting to convey the whole property. This is the title of the common author of plaintiffs' ancestor and of the defendant, and is affirmed by both.

There is, also, in evidence a deed from Daniel J. Dohan to the defendant, of an undivided one-half interest therein.

Manifestly, the plaintiffs rest their claim of ownership upon the title of Harris.

But we are left in the dark as to the precise character of their pre-

State ex rel. Singer vs. Sheriff et al.

tensions. Whether they claim that the title was *joint and several* as to the two vendees, "Daniel J. Dohan and his wife, Rebecca Dohan," or that it was community property, and they inherited their mother's undivided one-half interest, is not quite clear.

There is neither averment or proof of the residence of Daniel J. Dohan and wife at the date of their purchase from Harris on the 21st of February, 1850, nor at the date of Rebecca Dohan's death. There is a recital in the deed that they resided in the State of Mississippi.

Such recitals contained in a deed that is offered in evidence by plaintiffs in proof of title, cannot be considered as proof of domicile. 10 Ann. 268, *City vs. Sheppard*; 4 Ann. 555, *Hill vs. Spangenburg*; 5 Ann. 348, *Davis vs. Benion*; 1 Ann. 200, *Jones vs. Reed*.

If, in point of fact, Daniel J. Dohan and Mrs. Rebecca Dohan were citizens of the State of Mississippi at the date of their purchase from Harris, in 1850, and their title thereby taken out of the operation and effect of our community laws, plaintiffs should have proved that fact clearly and affirmatively.

We think their allegations are sufficiently broad to admit of the introduction of the needed evidence. They are to the effect that they are the owners by inheritance from their mother, Mrs. Rebecca Dohan of an undivided one-half interest in the Ashland plantation, purchased from Harris by Daniel J. Dohan and his wife, Rebecca Dohan, in 1850.

Under the circumstances and for the purposes of justice, we think the case should be remanded for a new trial in pursuance of the views herein expressed.

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled and set aside; and it is further ordered, adjudged and decreed that the cause be remanded to the court below for a new trial in pursuance of the views herein expressed, and that the cost of appeal be taxed against the plaintiffs and appellees.

No. 10,136.

THE STATE EX REL. G. A. SINGER VS. J. E. MCGUIRE, SHERIFF,
ET AL.

A party who has acquiesced in a judgment of the Supreme Court, which has acquired the force of *res judicata*, dismissing for want of jurisdiction an appeal in a case in which he was a party and virtually deciding that the matter in dispute comes within the exclusive jurisdiction of the Court of Appeals, cannot be permitted to question the exercise of that jurisdiction by the latter court, the less so, where he has formally submitted himself to it.

A prohibition in such a case does not lie.

APPPLICATION for Prohibition.

O. J. & J. S. Boatner for the Relator.

J. T. Ludeling for the Respondents.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The relator complains that the judges of the Second Circuit Court of Appeals have entertained jurisdiction over a cause in which the State National Bank claimed of him the sum of \$2011.17, and that said judges have rendered against him a judgment for \$736, on which execution was issued in the district court and is in the hands of the sheriff.

He charges want of jurisdiction *ratione materiae*, and seeks a prohibition to arrest further proceedings, and other relief.

The judges and the judgment creditor return, as their defense, that in the suit of the Bank vs. L. D. Allen and garnishees, in which the judgment rendered was brought up for review by the bank to this Court, the appeal was dismissed for want of jurisdiction, and the latter was one of the garnishees, appellees in that case. State National Bank vs. Allen, 39 Ann. 806.

The judgment of dismissal is therefore invoked as *res judicata* and as recognizing jurisdiction in the Circuit Court of Appeals. The defense is well founded.

There is nothing to show that the relator objected to the jurisdiction of the latter court, when the case was before it for hearing and determination. He must therefore be considered as having acquiesced in the judgment of this Court dismissing the appeal, which constitutes *res judicata* and is conclusive.

Relator is estopped from questioning its correctness and validity.

Interest reipublica ut sit finis liticium.

It is, therefore, ordered and decreed that the restraining order herein made be rescinded, and that the application for a prohibition be refused, with costs.

No. 10,129.

ALFRED JARDET VS. BOARD OF LIQUIDATION.

Under the terms of Section 1 of Act 11 of 1875, the Board of Liquidation is prohibited from issuing bonds of the State in lieu of its outstanding obligations, bearing date antecedent to its passage, until the legality and validity of same had been first determined and established by final decree of this Court.

Necessarily, the duty of the plaintiff was to prosecute an appeal to this Court, in order to obtain such final decree, notwithstanding there was judgment in his favor in the lower court.

 LeBeuf vs. Webre et als.

A PPEAL from the Seventeenth District Court, parish of East Baton Rouge. *Burgess, J.*

Read & Goodale and W. S. Benedict, for Plaintiff and Appellant.
M. J. Cunningham, Attorney General, for Defendant and Appellee.

The opinion of the Court was delivered by

WATKINS, J. Judgment was rendered in the court below on default in plaintiff's favor, declaring the warrants sued on to be legal and valid obligations of the State, and directing and requiring the defendant board to fund the same, and issue bonds of the State in exchange therefor.

The plaintiff has brought up this appeal in conformity with the requirements of section 1 of act 11 of 1875, which prohibits the Board of Liquidation from issuing State bonds in lieu of outstanding obligations of the State that were issued previous to its passage, "the legality or validity of which may have been, or may hereafter be questioned, until said bonds, or warrants, shall first, by final decree of the Supreme Court of the State of Louisiana, have been declared legal and valid obligations of the State, and that same were issued in strict conformity to law, and not in violation of the Constitution of the State, or of the United States, and for a valid consideration." This he was bound to do. 33 Ann. 124, *State ex rel. Meyers vs. Board of Liquidation*; 37 Ann. 176, *Charles vs. Board of Liquidation*.

There is nothing apparent from an inspection of the warrants to impeach their validity or legality; and neither their validity or legality have been questioned by the Governor or Attorney General. It is, therefore, fair to presume that they are unquestionably valid.

Judgment affirmed.

No. 10,110.

A. LEBŒUF VS. MARIE J. WEBRE ET ALS.

A creditor of a succession has a right to require the administration thereof to be conducted according to law, and to that end, to require that all its property shall be included in the inventory, and to prevent improper and illegal sales thereof. He is not bound, in order to maintain such action, to allege or prove the insolvency of the succession. Its solvency or insolvency depends on the result of the administration, on the value of its property and the amount of debts which may be presented against it; and the creditor is not bound and has not the means to solve this question in advance.

Our jurisdiction in such a case is governed by the amount of the "fund to be distributed."

LeBeuf vs. Webre et als.

APPEAL from the Twenty-second District Court, Parish of St. James. *Rost, J.*

Sims & Poché, for Plaintiff and Appellant.

Robert G. Dugue, for Defendant and Appellee.

The opinion of the Court was delivered by

FENNER, J. We adopt defendant's own statement of the case:

"The plaintiff alleges, in substance, that he is a creditor of the estate of B. S. Webre for \$1,197.66; that the administratrix, who is a daughter of the deceased, has caused an undivided half of certain real estate to be advertised for sale to pay debts, although the whole belongs to the succession, and that she has purposely excluded one-half thereof from the inventory and from the sale, in order to shield it from the claims of his creditors. That the entire property is burdened with a Citizens' Bank stock mortgage, which is an impediment to a valid sale of one-half of the property; that the creditors are entitled to a new inventory and to a sale of the whole, and that the plaintiff will suffer irreparable injury by the contemplated sale.

"His prayer is for an injunction to arrest it, and for a judgment recognizing the succession as owner of the entire plantation, directing new inventory and a sale of the whole to be made, and rescinding the order of sale already rendered.

"The defendant, after excepting to the petition as disclosing no cause of action and no ground for an injunction, answered by emphatically denying the truth of plaintiff's allegations.

"The exception was sustained, the injunction dissolved, and the suit dismissed, with fifty dollars special damages for attorney's fees, and the plaintiff has appealed."

The ground upon which the judge acted was the absence of any allegation that the succession was insolvent, or that the sale as advertised would not realize enough to pay him and all other creditors.

We do not think that such allegations were essential. The object of administration of a succession is to liquidate it by ascertaining the amount of its property and of its debts and by appropriating the former to the payment of the latter, and distributing any resulting residue among those entitled to it.

The fundamental basis of such administration is a correct and complete inventory of the property, which is made by law the measure of the administrator's bond, and exhibits the fund to which the creditors must look for the satisfaction of their claims.

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The solvency or insolvency of the succession depends upon the result of the administration, upon the price which the property brings when sold, and upon the number and amount of the debts which may be presented against it.

Many successions, supposed to be solvent, prove to be the reverse.

A creditor is not bound to solve this question in advance, and has not the means to do so. But he is entitled to require that the administration be conducted according to law, that all the property belonging to it shall be included therein, and that it shall not be sacrificed by improper and illegal sales.

Obviously, if the whole of this real estate belongs to the succession, as alleged, the sale of an undivided half of it would be both improper and illegal. Perhaps, under C. C. 1135, such a sale would not be warranted, even if the succession only owned the undivided half; but certainly if it owns the whole it could not sell an undivided half in the manner proposed.

We think the petition sets forth a sufficient cause of action, both for the completion of the inventory, and for the injunction.

The case is clearly one affecting the "fund to be distributed," which greatly exceeds \$2000, and the suggestion as to our lack of jurisdiction has no force.

It is, therefore, ordered, adjudged and decreed, that the judgment appealed from be annulled, that the exception of no cause of action be overruled, and that the case be remanded to be proceeded with according to law, defendant to pay costs of said exception in the lower court and of this appeal.

No. 10,045.

THE BOARD OF ADMINISTRATORS OF THE CHARITY HOSPITAL OF NEW ORLEANS VS. THE NEW ORLEANS GAS LIGHT COMPANY.

The legal effect of the consolidation of two corporations under the provisions of Act No. 157 of 1874 is a perfect amalgamation which terminates the existence of the consolidating companies as separate autonomies and operates the creation of a new one, thus concentrating in one corporation, the members, the property and the capital stock of both.

The consolidated corporation not only assumes duties and obligations similar to those of the former corporations, but it will be held on the very identical liabilities and obligations incurred by either of the former companies.

Hence, under the amalgamation effected between the New Orleans Gas Light Company and the Crescent City Gas Light Company, the obligation imposed by the Legislature on the former company to furnish gas, free of charge, to the Charity Hospital, adheres to the new or consolidated company, without reference to the term or duration of the charter of said company as previously composed.

A PPEAL from the Civil District Court for the Parish of Orleans. *Houston, J.*

Farrar & Kruttschnitt and S. S. Carlisle for Plaintiff and Appellant:

1. The obligation to furnish free gas to the Charity Hospital was, by the Act of 1845, made one of the conditions of the charter of the New Orleans Gas Light Company.
2. The consolidation of that company with the Crescent City Gas Light Company was not a merger or union, but a "perfect amalgamation." *Fee vs. Gas Co.*, 35 Ann. 416; *N. O. Gas Co. vs. La. Light Co.*, 115 U. S. 697.
3. The legal effect of this perfect amalgamation was to "terminate the existence of the original corporations, to create a new corporation, to transmute the members of the former into the members of the latter, and to operate a transfer of the property, rights and liabilities of each old company to the new one". *Fee vs. Gas Co.*, *supra*.
4. The charter of the New Orleans Gas Light Company, therefore, never did expire by limitation. It expired before the arrival of the term, because it took the benefit of a legislative act, the effect of which was a termination of its charter upon the condition that the new being, to the formation of whose existence it contributed, should be bound by all of the conditions and obligations imposed in its charter.
5. The litigation between the New Orleans Gas Light Company and the Crescent City Gas Light Company as to the constitutionality of Act 66 of 1860 is not binding on the Charity Hospital, who was no party thereto, though having an interest exceeding \$60,000 in the result.
6. The consolidation between the parties litigant prior to the final decree, makes the judgment in that case a mere consent judgment, binding only on the parties.
7. Being no party to that litigation, the Charity Hospital is entitled to discuss now the constitutionality of Act No. 66 of 1860, if it has any bearing on its rights.
8. The defendant is estopped from setting up that said act is unconstitutional. It is bound by all the estoppels that either of its constituent members were bound by; and the New Orleans Gas Light Company, having accepted the provisions of said act and complied with its terms, cannot be heard to say that the same is unconstitutional.
9. The object of that act is expressed in its title, and is declared to be "to extend the area of gas lighting in the city of New Orleans, and to reduce the price now paid by consumers."
10. Under the then existing contract relations between the State and the New Orleans Gas Light Company this expressed object could not be accomplished without the consent of that company, and without making to it some compensation for the invasion of its chartered privileges contemplated by the object of the act.
11. The extension of the charter of that company for twenty years, in consideration of its consent to perform the onerous duties necessary to enable it to realize the object of the Legislature, was the natural, reasonable, appropriate and efficient means adopted by the Legislature for the accomplishment of that object.
12. It is not necessary that the title to an act should specify or enumerate the means adopted by the Legislature to accomplish the object stated. *Hammond vs. Lesseps*, 31 Ann. 330; *American Printing House vs. Dupuy*, 37 Ann. 191
13. The reasoning of the Court in the case of *Crescent City Gas Light Company vs. New Orleans Gas Light Company*, 27 Ann. 144, begs the question and does not discuss the real issue. It is, therefore, without weight in the determination of the rights of the plaintiff.

Braughn, Buck, Dinkelspiel & Hart for Defendant and Appellee.

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The opinion of the Court was delivered by

POCHE, J. The issue involved in this case is the alleged obligation of the defendant company to furnish gas, free of expense, to the Charity Hospital.

Plaintiffs rest their demand on the provisions of Act 100 of 1845, which amended the charter of the New Orleans Gas Light Company, as then composed, and by which the company was required to furnish the Hospital all the "gas and fixtures necessary for lighting the same free of charge." Hence, they aver that the legislative requirement followed the company in the act of consolidation and amalgamation between it and the Crescent City Gas Light Company on the 29th of March, 1875, effected under the authority of Act 157 of 1874, authorizing the consolidation of corporations in this State, by means of which the defendant company, as at present organized, came into legal existence.

Its resistance is predicated on the fact that, under the effect of the legislation of 1845, the charter of the previous New Orleans Gas Light Company expired on the 1st of April, 1875, and that with it was extinguished the obligation of the present company to furnish gas, free of charge, to the Charity Hospital.

Plaintiffs prosecute this appeal from an adverse judgment.

It appears that, after the act of consolidation, until January, 1886, the consolidated company continued the free supply of gas to the hospital, but on the 19th of January, of that year, it was resolved by the Board of Directors that in the future, the Charity Hospital would be charged regular price for the gas consumed by it; hence, this suit, which was begun by an injunction for the purpose of restraining the defendant from cutting off the free gas supply.

The controversy hinges upon a proper construction of the legal effect of the act of consolidation between the two previously existing companies.

As bearing on the issues to be discussed must be noted the incorporation of the Crescent City Gas Light Company, by an act of the Legislature, No. 97 of 1870, as amended by Act 106 of 1873, by means of which legislation the company thereby created was granted the sole and exclusive privilege of making and vending gas lights in the city of New Orleans for a term of fifty years, after the date of the expiration of the charter of the New Orleans Gas Light Company, as then existing, and which, under its charter, was in the exercise of the exclusive privilege to supply gas to the people and city of New Orleans.

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But, in the meantime, the Legislature, by Act No. 66 of 1860, had extended the charter of the New Orleans Gas Light Company to the 1st of April, 1895; and its provisions clashed with the legislation of 1870 and 1873 in favor of the Crescent City Gas Light Company. Hence, arose litigation between the two companies, in which a decision was rendered by this Court declaring that the Act No. 66 of 1860 was unconstitutional.

While a writ of error, taken from that decision, was pending in the Supreme Court of the United States, the two companies entered into a compromise, resulting in the dismissal of the writ, and culminating in the consolidation of the 29th of March, 1875, hereinabove referred to.

The Act No. 157 of 1874, under which the consolidation was effected, reads as follows:

"Any two business and manufacturing corporations or companies, now existing under general or special law, whose business and objects are in general of the same nature, may amalgamate, unite and consolidate said corporations or companies, and form one consolidated company, holding and enjoying all the rights, privileges, powers, franchises and property belonging to each, and under such corporate name as they may adopt or agree upon; such consolidation shall be made by agreement, in writing, by or under the authority of the board of directors, and with the assent of the owners of at least three-fifths of the capital stock of each of said corporations or companies, and a certificate of the fact of such consolidation with the name of the consolidated company shall be filed and recorded in the office of the Secretary of State; provided, that no such consolidation shall in any manner affect or impair the right of any creditors of either of said companies. In the agreement of consolidation, the number of directors of the consolidated company shall be specified and the capital stock may be in the amount agreed upon by the companies or corporations, and set forth in the articles of consolidation."

It is not disputed by the defendant company that, as a legal result of the amalgamation, the obligation theretofore resting on the New Orleans Gas Light Company to supply gas, free of charge, to the Charity Hospital adhered to the consolidated company, but the contention is that the obligation was only co-equal with the duration of the charter of the company which was burdened with that duty, and that, therefore, the obligation became extinct on the 1st of April, 1875, at which time the charter of that company is alleged to have expired.

That conclusion is predicated on the proposition that the consoli-

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tion of the two previous companies operated merely a merger of one of the corporations into the other, and that the measure of the rights, privileges and franchises or vitality infused in the consolidated company by each of the consolidating corporations was the respective terms of duration of the charter of each.

But that argument finds no support either in the facts of the case or in well settled jurisprudence on the question of the effects of an amalgamation of two distinct and co-existing corporations.

In dealing with the question of the legal effects of the consolidation of the identical companies now under discussion the Court said :

“The articles of consolidation and the legislative act, by authority of which they were executed, evidently present a case of complete and perfect amalgamation, the effect of which was, under American authorities, to terminate the existence of the original corporations, to create a new corporation, to transmute the members of the former into members of the latter, and to operate a transfer of the property, rights and liabilities of each old company to the new one.” *Fee vs. Gas Company*, 35 Ann. 416.

That opinion was sanctioned both by reason and by the nature of the act by which the consolidation had been authorized, as well as by the highest judicial authority in the land.

The principle had been announced by the Supreme Court of the United States on several occasions, and was in one of its adjudications couched in the following language :

“The effect of the consolidation was a dissolution of the three corporations, and at the same instant the creation of a new corporation, with property, liabilities and stockholders derived from those passing out of existence.” *Clearwater vs. Meredith*, 1st Wallace, p. 40. These views were repeatedly re-affirmed by that exalted tribunal. *Shields vs. Ohio*, 95 U. S., p. 323; *Railway Company vs. Maine*, 96 U. S. 510; *Railroad Company vs. Georgia*, 98 U. S. 362.

It may not be amiss to add that our views on this question in the *Fee* case, 35 Ann. 416, were quoted with approval, and made the basis of its reasoning by the Supreme Court of the United States in the case of the *New Orleans Gas Company vs. the Louisiana Light and Heat Producing and Manufacturing Company*, 115 U. S. p. 697.

On the same subject, Taylor on the Law of Corporations, Sec. 425, uses the following language: “On the other hand, the consolidated corporation not only assumes duties and obligations similar to those of the former corporations, but as a general rule will be held on the

very identical liabilities and obligations incurred by either of the former companies."

The same principle is dealt with by Field on Corporations, Sec. 435, as follows: "And the general rule is that the rights of creditors vs. the old companies revive against the new one created by the consolidation, as we have just noticed, and that it becomes substitute for the former; provision is made, perhaps generally made, by statute or by articles of agreement, as provided by law, for the payment of the creditors and the satisfaction of the old obligations of the consolidating companies, *but even where no such provision is made, but the same consolidation is consummated lawfully, the new company has been held liable to all obligations of the former ones, to the very necessity of the case and to prevent the failure of justice.*"

Our reading of the act of 1874 authorizing the consolidation of corporations and of the articles of agreement adopted under its authority by the two original companies which were consolidated on the 29th of March, 1875, has satisfied us that both were conceived, drafted and adopted under the guidance of the very expositions of the principle to which we have herein referred to, and that, therefore, the same legal effects must flow from the amalgamation out of which the present defendant sprang into legal existence.

Hence, we cannot adopt the reasoning which would measure the consolidated powers, privileges or obligations of the present new company by reference to the term of duration of the charters of the former companies. And we hold now, as we did in the Fee case (35 Ann. 416), that the charters of the two former companies terminated their existence on the 29th of March, 1875, and that all the powers, rights, liabilities and vitality which both possessed at that very moment were infused and incorporated into the new company which was then born of the amalgamation.

The very legal existence of the defendant company hangs upon the vivifying breath of that legal creation.

It seems quite natural for the defendant, in its present attitude, to continue to draw the breath of life from the new being created out of the union of its parents who ceased to exist at its birth, while it unnaturally repudiates the essential conditions legally imposed on its creation.

Under the articles of agreement, and as a result of the amalgamation, the consolidated company became the owner, and went into possession of all the gasworks, machinery, main-pipes, service-pipes, meters, lamps and all other property then in use for the business of

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gas manufacture and distribution, including all real estate (with one exception) then belonging to the former New Orleans Gas Light Company, and it is yet the undisputed owner of all that property. Should any one, for instance some dissatisfied stockholder of that former company, seek to disturb its possession and enjoyment of that property, he would be triumphantly met by a reference to the act of amalgamation. But, in defendant's opinion, the same rule does not apply when it is called on to comply with an obligation which then attached as an essential legal condition of the very existence of one of the authors of its being under the law. To such a demand the answer is that the obligation was cancelled by the expiration of the charter of the former company.

The law cannot and will not tolerate such a course. Through the same channel which led the defendant company to the right of ownership of all the property and rights of the former New Orleans Gas Light Company, it must be led and coerced to the discharge of the obligations which had been imposed on its author by the law which had created it and which authorized the organization of the new company.

That position cannot be successfully assailed by a consideration of the opinion of this Court in the 27th of Annuals which declared the unconstitutionality of the act of 1860, which purported to extend the charter of the former New Orleans Gas Light Company to 1895. That decision was rendered in February, 1875, and the amalgamation was effected in March following, and the measure was adopted as a compromise of the possible effects of the decision. By that compromise all advantages resulting from that decision in favor of the Crescent City Company, were in fact, if not formally, waived. Under the effect of the writ of error taken from this to the Supreme Court of the United States, the decree in the case was not yet final between the parties when they agreed to abate the litigation.

On this point the record contains the following statement: "It is further agreed that from the judgment rendered by the Supreme Court of the State in the case of The Crescent City Gas Light Company vs. The New Orleans Gas Light Company, a writ of error was prosecuted by the New Orleans Gas Light Company to the Supreme Court of the United States, and that said writ of error, in consequence of the agreement of consolidation between the two companies, was dismissed by consent of parties."

It is thus made clear that the judgment was not final when the consolidation was effected, and the conclusion is warranted that *quoad*

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the amalgamation, the judgment thus rendered and suspended, must have been entirely ignored, and cannot now be considered.

That conclusion is removed beyond the possibility of a doubt by many features which were embodied in the articles of agreement or amalgamation.

Among others we note the following :

The capital stock of the consolidated company was fixed at \$10,000,000, of which \$3,750,000, or 37,500 shares of \$100 each were considered as paid up. Now, out of those, 25,000 shares were distributed *pro rata* to the holders of 19,800 shares of \$100 each, which represented all the stock previously issued by the N. O. Gas Co. ; and the remainder, only 12,500 shares, was allotted to the holders *pro rata* of 30,000 shares of \$100 each, issued to that date by the Crescent City Gas Co.

It was also stipulated that the holders of the 19,800 shares of N. O. Gas Light Co. were to receive a dividend of 6 per cent on July 1, 1875, while no dividend was to be paid to the stockholders of the Crescent City Co. before the 1st of January, 1876.

Again, the whole force of employees, including the President and Board of Directors of the New Orleans Gas Light Company, were retained to manage and control the new company until the second Tuesday of July, 1875.

Would the Crescent City Gas Light Company, holding a charter good for fifty years, have made such concessions, and granted such and other similar advantages in a contract of amalgamation, to a company whose legal existence was, to the knowledge and belief of both of the contracting parties, to have terminated within three days?

The judicial mind cannot be strained to the extent of believing a condition of things so much at variance with all springs of human action.

We therefore conclude and we hold that, the obligation to furnish gas, free of charge, to the Charity Hospital adheres to the consolidated company.

The views thus reached leave but one question open to discussion, and that is to determine the length of time during which the obligation will continue.

The considerations which led us to the conclusion that the duty in question adhered to the new company after the 1st of April, 1875, even under defendant's contention to the contrary, logically lead to the conclusion that it will exist as long as the consolidated corporation

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will continue to operate under the authority of the amalgamation and of the law which sanctioned it.

Its effect, as we said in *Fee's* case, was to terminate the separate existence of the former corporations, and "to transmute the members of the former into members of the latter, and to operate a transfer of the property, rights and liabilities of each old company to the new one."

Nothing suggests a difference between the results of a perfect amalgamation in law, and those produced by an amalgamation in physical science.

As is the case with the latter, in an amalgamation in law, all the parts of the component matters or things to be subjected to amalgamation, must enter in the formation of the new being or matter to be thus produced. And the amalgamation, in order to be and remain complete as intended, must continue to combine all the parts or elements from which the new being had been formed.

The subsequent withdrawal from the amalgamation of any of its component parts would destroy, or at least alter its autonomy.

Thus, in the instant case, the property, rights and liabilities of the former New Orleans Gas Light Company, must continue as component parts of the amalgamated company, or otherwise the latter's autonomy would be changed into a new or different corporation. After the 1st of April, 1895, the property and franchises of the old N. O. Gas Light Company will remain in the consolidated company just as they existed and were transferred on the day of the amalgamation. As a component part of the new corporation the old company is estopped from averring a limit to a transfer, which was not stipulated in the contract, and its original stockholders are forever debarred from setting up any claim in their original capacity to any of the property, or rights which were thus vested in the new company.

Treating of the legal effect of a similar amalgamation, the Supreme Court of the United States used the following language, which is quite in point on the present discussion :

"Looking thus at the legislative intent appearing in the consolidation act, we are constrained to the conclusion that a new corporation was created by the consolidation effected thereunder in the place and lieu of the two companies previously existing, and that whatever franchises, immunities or privileges it possesses it holds them solely by virtue of the grant that act made. That generally the effect of consolidation, as distinguished from a union by merger of one company into another, is to work a dissolution of the companies consolidating, and to create a new corporation out of the elements of the

former, is asserted in many cases, and it seems to be a necessary result." 98 U. S., p. 363, *Railroad Co. vs. Georgia*.

In our opinion there is no possible escape for defendant from the relief claimed by plaintiffs.

The judgment appealed from is therefore reversed, and it is ordered and decreed, that the preliminary writ of injunction issued herein be perpetuated, that the New Orleans Gas Light Company, defendant herein, is obliged to furnish gas, free of charge, to the Charity Hospital of New Orleans, as long as said company shall continue to operate under its present organization, and that said defendant pay all costs in both courts.

Rehearing refused.

CONCURRING OPINION IN PART.

FENNER, J. The Act No. 157 of 1874 undoubtedly authorized the consolidation of the Crescent City and the New Orleans Gas Light Companies; and the effect of that consolidation, as we held in *Fee's case* (35 Ann. 413), was, "to terminate the existence of the original corporations, to create a new corporation, to transmute the members of the former into members of the latter, and to operate a transfer of the property, rights and liabilities of each old company to the new one."

The rights and obligations of each old company passed to the new company just as they stood; the consolidation created no new rights and no new obligations, nor did it enlarge or diminish, restrict or extend, existing rights or obligations.

If the Legislature had granted to one of the old companies any peculiar franchise which had not been granted to the other, obviously the duration of such franchise would be limited by the term for which it had been granted, *i. e.*, by the duration of the charter of the company possessing it. The right held by this company would be the right to exercise the franchise during the term for which it was granted by the Legislature, that is, during the term of its charter, and it could not, by consolidation, confer upon the new company a greater right or one extending over a longer term; it being borne in mind that the act authorizing this consolidation has no reference to these particular corporations, but is a general law applicable to all business and manufacturing corporations. Otherwise, any corporation possessing a valuable franchise, limited as to its term by the length of its charter, might prolong it indefinitely by waiting until it was about to expire

and then consolidating with some other company having longer life, whose "objects and business were of the same general nature" but which did not possess this particular franchise or right.

The statement of such a proposition is sufficient to refute it.

The same rule must necessarily apply to obligations resting exclusively on legislative imposition, such as the one here involved. The obligation to furnish free light to the Charity Hospital has no basis except in the legislative will and power accepted by the New Orleans Gas-light Company under and according to the terms imposed, which expressly limited the obligation as to time by the words, "during the continuance of the charter of said Gas-light Company."

Therefore, at the moment of the consolidation, the old New Orleans Gas-light Company was subject to no obligation to furnish free gas to the hospital, except for a term limited by the term of its charter. This obligation and no other was transmitted to the consolidated corporation under the letter and spirit of the law.

While the consolidation terminated the existence of both old corporations, yet this destroyed neither the rights nor obligations of either, which were held by the new company precisely as they were held by each of the old ones.

Hence, the new company received the obligation precisely as the old company held it and would have continued to hold it but for the consolidation, to wit: during the term for which its charter had been granted, and I dissent from the contrary views expressed in the majority opinion.

I concur, however, in the view that this term extended to April 1, 1895, under the effect of Act 66 of 1860. The judgment of this Court declaring that act unconstitutional never became *res judicata*, by reason of the writ of error from the Supreme Court of the United States, and by reason of the compromise or transaction between the parties resulting in the consolidation which settled the whole controversy between the parties to that suit and withdrew it from further litigation by the dismissal of the writ of error, which dismissal was expressly bottomed on said settlement.

It does not lie in the mouth of the defendant corporation representing, as it does, the old New Orleans Gas-light Company, which accepted and acted under said act and enjoyed the extended privileges granted thereby, to raise anew the question of its constitutionality.

On these grounds I concur in that part of the decree only which dissolves the injunction.

No. 10,176.

STATE EX REL. ISAAC W. PATTON, REGISTER, vs. W. T. HOUSTON,
JUDGE.

In order to invoke the exercise of the supervisory jurisdiction of this Court under the writs of certiorari and prohibition, relator must establish one of three things, viz: 1st. That the proceedings are infected with some fatal irregularity; or 2d. That the jurisdiction of the cause did not belong to the court which assumed it, but to a different court; or 3d. That the cause is of a nature jurisdiction of which is denied to any court, because not within the limits of judicial power.

Constitutional executive officers are not exempt from judicial authority to compel them to perform specific duties imposed upon them by law.

Officers charged with the conduct of elections and with the ascertainment and promulgation of the results thereof, may be compelled by mandamus proceedings to perform specific ministerial duties imposed on them by law.

Where the statute requires the registrar to appoint commissioners ten days, and to publish them six days, before the election, if he has violated his legal duty in the selection of such commissioners, parties interested are not precluded from judicial remedy because he has so acted. They could not proceed before he had acted, and if denied the right to proceed afterward this would be a complete denial of right. The object of the law in requiring action a certain time before the election was to afford an opportunity to correct any violation of duty which he might commit.

The questions as to whether the law imposed the duty alleged, whether the duty was ministerial or discretionary in its character, and whether the defendant had violated his duty, are mixed questions of law and fact belonging exclusively to the merits of the cause and constituting, indeed, the entire merits thereof, and the court being seized with jurisdiction of the case was necessarily invested with full power to consider and determine them. Mere error in the judgment, even if it exists, could only be corrected by us in the exercise of a jurisdiction purely appellate, and can form no foundation for invoking our supervisory jurisdiction.

APPLICATION for Certiorari and Prohibition.

E. D. White, E. H. McCaleb and W. H. Rogers for Relator.

The opinion of the Court was delivered by

FENNER, J. Relator invokes the exercise of our supervisory jurisdiction, by means of the extraordinary writs of prohibition and certiorari, to declare the nullity of a certain judgment rendered by the respondent judge, and to prohibit him from further proceeding in execution thereof.

The judgment complained of was rendered in a mandamus proceeding brought before the Civil District Court by Henry C. Warmoth and other Republican candidates for offices of the State which are to be filled at an election to be held on April 17th, wherein they allege that by virtue of Sections 13 and 15 of Act No. 58 of 1877, it was made the duty of the Registrar of Voters for the parish of Orleans to appoint

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40	393
45	535
45	538
40	393
48	293
48	789
48	829
48	1253
40	393
111	1091
40	393
114	971
40	393
117	297
40	393
120	625

State ex rel. Patton, Registrar, vs. Judge.

for each voting precinct three commissioners of election, to be assisted by a clerk of election, said commissioners and clerk to be selected from opposing political parties, such appointments to be made ten days before the election and to be published at least six days before the election; that more than ten days before the election representatives of the Republican party had requested said registrar to comply with his said duty by appointing a commissioner or commissioners selected from the Republican party, and had furnished him with names of qualified Republicans from which to make such selections; but that the said registrar had failed to perform the duty imposed upon him by law, and had violated said duty by appointing all the commissioners at said election from members of the Democratic party. On appropriate averments of the absence of all other adequate remedy, they asked for a writ of mandamus commanding and compelling him to appoint a commissioner at each precinct selected from the Republican party.

In answer to an order to show cause why the peremptory mandamus should not issue, the registrar filed the following defenses:

- 1st. An exception to the jurisdiction of the court;
- 2d. An exception of no cause of action;
- 3d. That in the appointment of commissioners he exercised a discretion legally vested in him by the statute and not subject to judicial control;
- 4th. That, in his said appointments, he had actually complied with all requirements of the law.

The case went to trial on these issues, evidence was heard, and the court, in an elaborate opinion, overruled all the defenses, and rendered judgment making the mandamus peremptory.

It is to be borne in mind that the proceeding now before us is not an appeal, and vests us with no appellate jurisdiction over the case, under which we may review questions merely affecting the correctness of the judgment.

The application invokes the exercise of our supervisory jurisdiction exclusively, and in considering it we must be guided and controlled by those rules and limitations which have been formulated and fixed by the laws of the State and the jurisprudence of this Court.

To obtain the relief sought herein under the writs of certiorari and prohibition, these rules imperatively require that relator shall establish one of three things, viz: either 1st, that the proceedings are infected with some fatal irregularity rendering them absolutely void, such as want of citation or refusal of a hearing, and the like; or 2d, that the jurisdiction of the cause did not belong to the court which assumed

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it, but to a different court; or 3d, that the cause is of a nature jurisdiction of which is denied to any court, because not within the limits of judiciary power.

It is not pretended that either of the two first grounds of relief is presented in this case. The perfect regularity of the proceedings in the court below is not questioned. There is no complaint that the court has assumed a jurisdiction which is vested by law in some other court. On the contrary, it will be admitted that, if any court is vested with jurisdiction over the persons and the subject-matter of the controversy, it is, and must be, the Civil District Court.

It follows, therefore, that the whole contention of relator is narrowed down to the proposition that the proceedings concern a subject-matter, the power to consider and determine which lies outside of the functions and powers of the judiciary.

Analyzing as completely as we can the positions of relator, we find this contention to be based on the following grounds, viz:

1st. That relator is a constitutional officer belonging to the executive department of the government, and not subject to judicial control in the execution of the functions of his office. This is answered by the very language of the Code of Practice touching the writ of mandamus, Art. 834 of which declares: "It may be directed to public officers to compel them to fulfil any of the duties attached to their office, or which may be legally required of them." There is no exception of constitutional executive officers, and our Reports are full of cases in which such jurisdiction has been exercised over the Auditor, the Treasurer, the Secretary of State, and other executive officers.

2d. That as the subject-matter of the case is one touching the conduct of elections, such matter does not lie within judicial cognizance. There is no authority and no reason to support this broad proposition. It is true that it has been held by this Court that in the absence of special statutory authorization courts are without jurisdiction, *ratione materie*, to entertain cases of contested election. *State vs. Judge*, 13 Ann. 89.

This is a rule widely recognized and generally prevalent, and resting on peculiar principles; but it has never been extended so far as to exempt officers charged with the conduct of elections and with the ascertainment and promulgation of the results thereof from judicial control to require them to perform the specific duties imposed upon them by law.

Thus says Mr. High, under the full sanction of authority: "Notwithstanding the rule denying the relief by mandamus to compel

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admission to a disputed office or to determine the title thereto, there are certain incidents connected with the question of title and election to public offices, which, from their nature, involve the exercise of merely ministerial powers, and are hence properly subject to control by mandamus. Among those incidents are the canvassing of election returns, the issuing of certificates of election to the persons entitled thereto, and the issuing of a commission to a claimant duly elected." High Ext. Legal Rem., § 55; State ex rel. Barbin vs. Secretary, 32 Ann. 579.

So says High: "Mandamus has also been held to be an appropriate remedy to protect the right of a voter to registration of his name upon the poll-list. And a registering officer, appointed under the laws of the State for this purpose, may be compelled by the writ to register the names of voters applying for registration and properly entitled to vote." High, id. § 65.

Of course, in all such cases, the propriety of the writ will depend upon the distinction between duties of a purely ministerial nature involving the exercise of no official discretion, and those which are *quasi-judicial* and involve the exercise of such discretion.

It would, indeed, be monstrous if officers charged by the Legislative will, with specific duties intended for the protection of the electoral right of the citizen and for the security of fair elections, could disregard and violate them with impunity. No authority is or can be cited exempting public officers charged by law with specific ministerial duties in election matters from the same judicial control which is exercised over all other officers of the State with reference to similar duties.

3. It is claimed that the statute required that the appointment of commissioners should be made ten days before the election, and published at least six days before the election; that having so made and published his appointments, his power was exhausted, and courts had no power to compel him to undo or to correct what had been done. We are strongly doubtful whether this ground does not go exclusively to the merits of the case, and is not, therefore, beyond our review in this case. But, at all events, it is entirely without merit.

The right to invoke the aid of courts to compel the performance of this alleged duty could not arise until the relator was actually in default. This is elementary, and is strongly announced by Mr. High, as follows: "Mandamus is never granted in anticipation of a supposed omission of duty, however strong the presumption may be that the persons whom it is sought to coerce by the writ will refuse to perform

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their duties when the proper time arrives. It is, therefore, incumbent on the relator to show an actual omission on the part of the respondent to perform the required act, and since there can be no such omission before the time has arrived for the performance of the duty, the writ will not issue before that time." High, Ex. L. R. § 12.

Relators in the case below were not in position to exercise their right until, by the action of the Registrar, he placed himself in default by violating his alleged duty. A legal right cannot be paralyzed by such a paradox which says to the person injured: "You cannot proceed before the Registrar acts, because it is too soon; and you cannot proceed after he has acted, because it is too late." On the contrary, we are satisfied that the very object of the law in requiring the Registrar to act in a certain period preceding the election was to afford parties an opportunity to correct any violation of his duty which he might commit.

4. The final grounds are that the law relied on did not impose on the Registrar the specific duty, the performance of which was sought to be enforced by mandamus, and that the duty imposed with reference to the appointment of commissioners was of a character involving the exercise of official discretion, and that, having exercised such discretion and discharged his duty in accordance therewith, his action is not subject to judicial control by mandamus.

It is obvious that these questions belong exclusively to the merits of the cause. In every mandamus proceeding brought against public officers, in the language of the Code of Practice, "to compel them to fulfil the duties attached to their office, or which may be legally required of them," the questions necessarily arise, Is the duty alleged imposed by the law? Has the officer violated the duty? Is the duty of a character authorizing the court to enforce it by mandamus? The solution of these questions constitutes the entire merits of every such proceeding and the sole judicial function involved therein. The court seized with jurisdiction of such a controversy is necessarily invested with full power to examine and determine these questions of mixed law and fact, the determination of which is a necessary condition precedent to the rendition of any judgment whatever. The claim that error in such determination entails the nullity of the proceeding and judgment, has no more foundation than a claim that like error would strike any other judgment with nullity. We are clearly precluded from considering such questions in this proceeding. As we said in a former case and have often reiterated: "The Constitution intended that our supervisory jurisdiction should be distinct, in

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nature as well as in name, from our appellate jurisdiction. The former was intended simply to enable us to compel inferior courts to perform their functions, to prevent them from exceeding the bounds of their jurisdiction, and to enforce the observance of that regularity in their proceedings, which is essential to fairness in the conduct of contradictory litigation. Mere error in the decision of questions properly submitted to their determination and regularly determined, can only be corrected in the exercise of a jurisdiction purely appellate." State ex rel. Wintz vs. Judge, 32 Ann. 1225.

Finding, in this case, that the respondent judge had jurisdiction of the cause, that he was vested with judicial power to hear and decide it, and that his proceedings have been, in all respects, regular, there is no occasion or room for the exercise of our supervisory jurisdiction,

It is, therefore, ordered that the applications for writs of *certiorari* and prohibition be denied, at relator's cost.

No. 10,002.

STATE EX REL. SAMUEL WOOD VS. BOARD OF LIQUIDATION OF THE
CITY DEBT.

The premium bond plan included all the *bonded* debt of the city of New Orleans of date antecedent to the adoption of the premium bond act in 1876; but it did not include any part of the city's *floating* debt.

Act 58 of 1882 included all of the city's bonded debt, other than that which had been funded into premium bonds.

Acts 31 of 1876 and 58 of 1882 operate as contracts between the city and her bonded creditors, and were based upon adequate consideration.

The surplus of the premium bond tax beyond the requirements of holders, other than the city, received its destination to the retirement of outstanding bonds, not funded into premium bonds by the terms of the premium bond act in 1876, antecedent to the adoption of the Constitution of 1879, and this covenant was but re-affirmed and re-announced in Act 58 of 1882.

There is a conflict between the provisions of Section 4 of Act 67 of 1884 and that of Section 7 of Act 58 of 1882, both of them having the common object of dedicating to two different classes of city debts the surplus of the premium bond tax.

Persons who deal with political or municipal corporations possessed of limited power to contract debts, *must* rely for their payment upon the annual revenues provided for them by law, in the absence of any special statute authorizing the creation of a contract therefor.

Any *posterior* law which has for its object to confer on such creditors as originally possessed no contract rights the prerogatives of those who had, and thereby intrudes the latter, is amenable to the objection of impairing the obligation of protected contracts.

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48	566
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119	636

A PPEAL from the Civil District Court for the Parish of Orleans.
Monroe, J.

W. S. Benedict for Relator and Appellant.

Leovy & Blair and *H. O. Miller* for Respondent and Appellee.

The opinion of the Court was delivered by

WATKINS, J. This is a proceeding by mandamus on the part of a holder of bonds of the city of New Orleans, bearing date July 1, 1884, and which were issued under and in pursuance of Act 67 of 1884, to coerce the Board of Liquidation to comply with its terms, and particularly with those of Sections 3 and 4.

Relator avers that it is the respondent's duty to apply, in the manner therein specified, the revenues, property and assets of the city to the payment of the interest and the redemption and cancellation of the capital of his bonds.

He further avers that it is the duty of respondent to advertise for sealed proposals for the exchange of *drawn premium bonds in the possession of the city* for the bonds issued under said act to the amount of \$50,000, *after each allotment of series*; and that as said statute has been in force since the date of its passage, on the 9th of July, 1884, and all the bonds in contemplation thereof have been issued, there should now be advertised for exchange, in accordance with Sections 3 and 4 of said act, for the various series allotted after that date, and regularly hereafter, bonds to the amount of \$50,000 to each allotment of series within that time.

He further avers that the respondent is in possession of funds in excess of the interest due on said bonds, and, also, in excess of the amount that is necessary to carry out the provisions of said act, and its failure to do so is a plain violation of law and an impairment of his contract in the sense of the State and Federal Constitutions.

The respondent's return is elaborate, and we make the following synopsis of it, viz:

That the premium bonds were given in exchange for other valid bonds of the city that were issued under laws anterior in date to the enactment of the premium bond act, on the 5th of March, 1876, and which pledged and dedicated to their payment adequate and sufficient taxes.

For their discharge, on the premium plan, a five mill tax was authorized and consecrated thereto, and on the faith of it they were

surrendered and funded to the extent of \$13,000,000, and of which there are extant about \$8,000,000 at this time.

That the premium bond act provided that this bonded debt aggregating \$20,000,000, when exchanged for premium bonds of \$20 each, should be divided into 10,000 series of 100 bonds each, the whole to be numbered from 1 to 10,000. That a certain amount of those series should be annually paid, in pursuance of an allotment made from the numbers of all the series, and that premiums should be awarded on the bonds of the drawn series in a similar manner.

That, as all of said bondholders had not participated in the plan and funded their bonds, all of the series drawn at the different allotments did not pass into the hands of holders, but near \$8,000,000 thereof remained in the possession of the city; that the premium bond tax, to the extent it would have been applied to its proportion of the premium bonds, constituted, in contemplation of the premium bond act, a *surplus* represented by the *drawn* premium bonds in the possession of the city, and that this surplus was, by the terms of the act, dedicated to the payment of these unfunded bonds, or exchanged therefor.

That the bonds contemplated by the premium bond act were binding contracts between the city and bondholders, and the adequate and sufficient taxes dedicated to their payment by the laws under which they were issued were enforceable and valid.

That in 1882 the Legislature made further provision for those unfunded bonds by authorizing the issuance of another class of bonds therefor, known as extended consolidated and certificate bonds, to the payment of which an *additional* five mill tax was dedicated, and said surplus of the premium bond tax was pledged; that on the faith of said pledge and dedication \$5,000,000 of same were exchanged therefor, and are still extant, and solely dependent thereon for payment and to which they have a vested right.

That of said bonds there are remaining unfunded, under either act, \$3,000,000, which are *still* entitled to claim the benefits of both and to participate in said tax and surplus, and which right the Legislature by any *subsequent* act is impotent to impair or take away.

That, in pursuance of the statutes of 1876 and 1882, the city has levied and is annually levying a one per cent tax for the exclusive benefit of *all* of said bondholders, whether their bonds have been funded or not; and, as it is charged with the custody and application of the proceeds thereof, it is wholly without power to divert them to any other object.

That Act 67 of 1884 provides for the issuance of bonds into which

are to be funded *judgment* or floating debts—as contradistinguished from *contract* or *bonded* debts—aggregating \$900,000 in amount, the greater part of which has been created since 1873, and no part of which was contracted prior to 1870, which was originally entitled to no special or sufficient tax for their payment, but which were wholly dependent upon the adequacy of the annual revenues for their discharge, and which are not entitled to participate in the one per cent tax.

That said act, in providing for an exchange of *drawn* premium bonds in the possession of the city for said floating debt bonds, undertakes, in effect, to appropriate to the latter *in advance of their maturities* the said surplus to the extent of \$200,000 annually, or \$500,000 for the time which has elapsed since the passage of the act, to the prejudice of the *contract* creditors of the city; and that this will the more clearly appear from the fact that respondent has in hand neither funds or property of the city—such as is mentioned in the act—with which to pay any part of said floating debt bonds.

That the amount of the premium bonds to be annually paid is annually increasing in value, and hence the proportion of the five mill tax applicable to the payment of each succeeding drawn series thereof is annually increasing to such an extent that the aggregate yearly excess is less than \$80,000; therefore, if *drawn* premium bonds in possession of the city are given in exchange for floating debt bonds to the amount required, not only would the surplus be consumed, but the proceeds of the premium bond tax would be absorbed, and the premium bond holders and the holders of bonds not funded would be deprived of the amount annually due them therefrom.

Finally, the respondent returns that the Act of 1884 is, in effect, an attempt to divert and misapply the one per cent tax in contravention of the pledges contained in prior laws, and, is enforced, contracts made in pursuance thereof will be impaired in the sense of the State and Federal Constitutions.

The Sun Mutual Insurance Company intervened and joined the respondent in resisting the enforcement of the Act of 1884.

It claims to be the holder of certain extended, consolidated and certificate bonds of 1882, and contends that, if said act is carried into effect, its contracts under various other and prior laws, enacted in 1852, 1854, 1869, 1870, 1871, 1873 and 1876—under which the bonds given in exchange were authorized and issued—as well as those under

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the law of 1882, would be impaired and violated, and said bonds depreciated in value to the amount of \$5000.

It also claims to be the owner of certain premium bonds, and if said act is enforced, its contract rights, under the premium bond act, will be likewise impaired and said bonds depreciated in value to the extent of \$5000.

It further avers that, by the terms of said statutes—all of which were enacted prior to 1879—the State of Louisiana and the city of New Orleans contracted with the bonded creditors of the latter to provide a *sufficient* tax for their payment.

That the undertaking, on the part of the State, acting for the city, as set forth in sections 5 and 6 of Act 58 of 1882, to levy a five-mill tax for the *exclusive* benefit of the bonds issued thereunder and others which were issued under prior laws, and not yet funded, was in furtherance of the contract rights created thereunder, and that its pledge of the surplus of the premium bond tax to the payment thereof was in further fulfillment of same.

That to said five-mill tax and surplus said bondholders not only had and have a vested right, but they give an adequate consideration therefor in surrendering their old bonds, the payment of which was secured by an adequate tax, and in extending their payment for forty years, and that the exchange contemplated by the Act of 1884, if enforced, would impair its contracts in the sense of the Constitution and the law.

As a part of its petition it adopted the averments of the respondent's return.

Its alternate prayer is that, in the event the desired relief is granted the relator, its contract rights, under prior laws, be protected.

Hence, the grounds of the respondent's and intervenor's resistance to the demands of the relator may be summarized as follows, viz :

First—That the debts of the city for which the bonds of 1884 were issued were floating debts, which were created under the general laws of the State, which made no other provision for their payment than such as may be contained in the annual revenue laws.

Second—That the premium bond plan only included the *bonded* debt of the city, contracted under special statutes, enacted prior to the passage of the Premium Bond Act in 1876, and which provided sufficient and adequate taxes for their payment.

Third—That the five-mill tax provided in the premium bond act was dedicated to *all* such bonds, whether exchanged for premium or not, and that the five-mill tax provided by Act 58 of 1882, and the

surplus of the premium bond tax were pledged to the bonds issued thereunder and others that still remained unfunded.

Fourth—That if the provisions of the Act of 1884 are enforced, as demanded by the relator, the vested rights of the bonded creditors—those who have not funded their bonds, as well as those who have—will be divested and their contract rights impaired.

I.

From the record we have obtained the following statement of facts, viz :

That the amount of the bonded indebtedness of the city that was included in the premium bond plan was about \$20,000,000 in capital alone.

Of this amount there were exchanged for premium bonds the sum of \$13,263,300.

They were issued under the following several statutes, viz :

Act 40 of 1833, Act 71 of 1852, Acts 108 and 109 of 1854, Act 49 of 1869, Act 7 of 1870, Acts 48 and 100 of 1871, Act 73 of 1872, and Acts 71 and 103 of 1874.

Of the remainder of the bonds not funded into premiums \$3,259,000 were funded into forty-year bonds under Act 38 of 1882, and there remained a surplus of bonds—not funded under either act—aggregating \$2,988,400 which are still extant.

The amount of premium bonds in the hands of third persons, other than the city, is \$7,418,240.

The annual yield of the one per cent tax for the four years antecedent to 1887 was as follows, viz :

For 1883, \$960,240 ; for 1884, \$947,950 ; for 1885, \$994,480 ; for 1886, \$849,100.

The total amount of funds in the hands of the respondent on the 1st of March, 1887, derived from the one per cent tax was \$294,000, subject to a reduction for unpaid interest on the bonded or contract debts to that date, \$130,000, and it has *no other assets* in hand except some shares of New Orleans Waterworks stock.

There has been required annually, for the redemption of premium bonds and drawn premiums in the hands of holders, *other than the city*, about \$400,000, and this amount has been, and still is, under the premium bond plan, annually increasing, so that the yearly surplus applicable to *drawn* premium bonds in the possession of the city, is less than \$80,000, and it is annually diminishing in amount.

At the first drawing that occurred in 1887, the city drew thirteen

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series, representing \$26,000 of premium bonds, while there were drawn by third persons extant forty-seven series, representing \$94,000 of premium bonds and \$16,000 of premiums—the whole being equal to \$110,000.

At this ratio they would be entitled, under four quarterly allotments in 1887, to \$440,000; hence, the surplus applicable to *drawn premium bonds in possession of the city* would be only \$50,000.

The annual interest on the bonds issued under the Act of 1882 and on the unfunded bonds of years antecedent to 1876, aggregates \$564,000, therefore, the surplus of the premium bond tax of 1887, it applied thereto—less the amount of the five-mill tax—would leave a deficit of \$40,000.

The floating debt of the city was incurred in years subsequent to 1870, and was to be paid out of the revenues of the respective years in which it was so incurred, and when there was an insufficiency of money on hand to pay same when presented, certificates were issued payable out of the revenues of said years when collected, and such certificates evidence the floating debt.

The amount of the judgment or executory debt—representing in great part the floating debt—funded into bonds under Act 67 of 1884, is \$980,000.

II.

From this state of facts the following propositions may be taken as clearly established, viz:

1. That the premium bond plan included *all the bonded* debts of the city prior in date to the passage of Act 31 of 1876, but that it did not include any part of the city's *floating* debt.
2. That Act 58 of 1882 included all of her bonded debt other than that represented in the premium bonds.
3. That all of those bonds were issued in pursuance of particular laws enumerated, and which authorized and directed the levy of sufficient taxes to meet them.
4. That Acts 31 of 1876 and 58 of 1882 operate as contracts between the city and her bonded creditors, and were based on an adequate consideration.
5. That as there is, approximately, an annual surplus of the premium bond tax of less than \$80,000, applicable to the drawn premium bonds in the possession of the city, the bonds funded under the act of 1884—if relator's demand be granted—would not only absorb it, but would absorb a large proportion of that tax that is applicable to *drawn premium bonds, and premiums held by third persons*. Relator's demand

being for *drawn* premium bonds, he would, if successful, be entitled to immediate payment of the *whole* amount, as soon as the exchange should be consummated. If it was for *undrawn* premium bonds, the consequence would not be so serious.

III.

Section 3 of Act 67 of 1884 is couched in the terms following, viz:

"That for the further redemption of said bonds, the said Board of Liquidation is hereby authorized and required, *after each allotment of series* following the passage of this act, to advertise for sealed proposals for the exchange of *drawn* premium bonds in the possession of the city, for the bonds authorized herein, to the amount of \$50,000 of said bonds," etc.

Now, as there are four allotments of series annually, the bondholders under that act would be entitled to exchange their bonds annually for \$200,000 of *drawn* premium bonds, and they would be entitled to \$500,000 thereof since the date of the passage of the act.

The effect of this plan, if enforced, would be to enable the holders of such bonds to realize the capital and interest within a few years, whereas the holders of consolidated and certificate bonds must wait ten and forty, and the holders of premium bonds must wait fifty years; i. e., if the one per cent tax were sufficient to pay them all. But we have seen that it would not—the annual requirements of the 1884 bonds being \$200,000; that of the drawn premium bonds held by third persons \$440,000; that of the extended and unfunded bonds \$564,000; and the one per cent tax only yielding about \$990,000. There must, of necessity, be an annual deficit of about \$215,000—an amount in excess of that demanded annually for the bonded creditors of 1884.

Not only is this true, but, if the entire amount of \$500,000 demanded by the relator is allowed him, the entire proceeds of the premium bond tax would be insufficient to meet it—the same being \$495,000—and all the bonded or contract creditors would be deprived of *any* participation therein, for at least one year; and of a large portion thereafter, until the \$980,000 of 1884 bonds should be fully paid.

In this manner the premium bond plan of 1876 would be impaired, if not annihilated, and so would the extended debt scheme of 1882.

But, perhaps, the most serious objection to the act of 1884 is, that it tends to *prefer* floating-debt bonds, not bottomed on any contract, to bonded debts of the city, and thus impairs the latter's contract rights. It thus confers upon a class of creditors, holding evidences of debt, primarily unsecured, and having only the right to collect their claims from any *balance* there might be of the annual revenues of any partic-

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ular year, not only the right to the proceeds of a special tax, but to the particular tax dedicated to contract creditors, who had made important concessions to obtain it—and years before.

This is attempted and insisted upon, in the face of the following provisions of Section 7 of 58 of 1882, viz: "That the *surplus* proceeds, if any, of the premium bond tax of each year, remaining in the hands of the Board of Liquidation of the city debt, or surplus on hand at the time of the passage of the act, after the drawn series, interest and premiums thereon, exigible or due to the holders thereof, have been provided for, or fully paid, shall also be deposited with the fiscal agent of the said Board, to the credit of the account known as 'the city debt fund,' and applied *exclusively* as provided in section five"; i. e., "to the *objects and purposes of this act.*"

There is a conflict between the provisions of the act of 1882 and the provision of Section 4 of Act 67 of 1884, which authorizes and requires the respondent "to advertise for sealed proposals for the exchange of *drawn* premium bonds in possession of the city." Both have *exclusive* reference to the surplus of the premium bond tax, and, as we have satisfactorily shown, it cannot meet both.

Section 4 of Act 67 of 1884 manifestly impairs the contract of the bonded creditors of the city as recognized and established under Section 7 of Act 58 of 1882.

Persons who deal with political or municipal corporations possessed of limited power to contract debts, must rely for their payment upon the annual revenues provided for them by law, in the absence of any special statute authorizing the creation of a contract therefor.

Any *posterior* law which has for its object to confer on such creditors as originally possessed no contract rights the prerogatives of those who had, and thereby infringe the latter, is amenable to the objection of impairing the obligation of their protected contracts, and cannot be enforced by mandamus.

IV.

But our attention has been attracted to the opinion of the Supreme Court in New Orleans Board of Liquidation vs. Hart, 118 U. S. 136, *et seq.*, and it is relied upon by counsel for relator as announcing a contrary interpretation of the statutes which are drawn in question here, in determining a question similar to the one now before us.

The one under consideration in that case was the right of the relator, Hart, to have his executory judgment funded into bonds, in pursuance of the provisions of Section 2 of Act 67 of 1884, it being "founded on *contracts*, for municipal purposes, made from 1871 to 1877."

To his demand the respondent board interposed, as an objection to their issuance, "that all the property of the city not dedicated to public use, and, also, the surplus of what is known as the premium bond tax, were pledged, under Act 58 of 1862, and by previous legislation, to the payment of other bonds of the city which were outstanding; and that the act of 1884, in so far as it directs a diversion of *that property and fund*, impairs the contract with the holders of those bonds, and is, therefore, unconstitutional and void."

The Court made a careful analysis of those statutes, and stated their conclusions thereon, and from which we make the following extracts, viz:

"There is no doubt of the right of the relator, under the act of 1884, to the bonds promised in compromise made with the city. His judgment is of the class of debts which it is made the duty of the board to retire and cancel by the exchange of the bonds provided, or the sale of them, and the application of their proceeds. * * *

"As seen by the preceding statement, all of the property and funds of the city *and* the excess of the proceeds derived from the tax for the interest on the premium bonds, beyond what was needed, were, by the act of 1880, pledged to pay her entire debt, *except the floating debt* previously created. This floating debt may have been as meritorious as the funded debt and the duty to make provision for it equally as binding. Why all the *property and funds* of the city should be appropriated to the latter debt, to the exclusion of the former, does not appear.

"The Constitution of 1879 contemplates that provision shall be made for the payment of the entire debt. It declares that the General Assembly, at its next session, shall enact such legislation as may be proper to liquidate the indebtedness of the city of New Orleans and to apply its *assets* to the satisfaction thereof; and this means, obviously, that the entire indebtedness in whatever form it exists, whether bonded or floating debt, and not merely a part of it. And the application of the *assets* of the city is to be in satisfaction of all the debts alike," etc.

From the foregoing it is evident to our minds that the court dealt with the question of the proper application of the "*assets*" and "*the property and funds* of the city," and not with the surplus of the premium bond tax.

For it will be observed that the point of resistance in that case was "that the act of 1884, in so far as it directs a diversion of *that property and funds*, impairs the contract," etc.

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No question was made by the respondent upon the score of the premium bond surplus.

It will be likewise observed that the court, when speaking of *what* was dedicated, both "the property and funds of the city" and "the excess of the proceeds" of the premium bond tax were included; but, in treating of what was *applicable* to the payment of the city's indebtedness, the phrase "property and funds of the city" was alone employed.

This theory is demonstrated by the reasoning of the court, which immediately follows our quotation, predicated upon the article of our code which declares that "whoever has bound himself personally is obliged to fulfill his engagement out of all his *property, movable and immovable*, present and future," R. C. C. 3149; and, also, on the article which declares that "the *property* of the debtor is the common pledge of his creditors, and the proceeds of the *sale* must be distributed among them ratably, unless there exist some lawful cause of preference. R. C. C. 3150.

It is manifest that a tax is but a forced contribution levied *upon* property of the citizens for the purposes of government, and is, in no sense, *property* of the corporation.

As such, it does not respond to the articles cited, nor to the argument and reasoning of the court.

This conclusion is fortified by the concluding paragraph of the opinion, viz:

"With the bonds he will not have any preference over other bondholders, but will be entitled to share ratably with them in the *proceeds of the property* appropriated for the payment of their bonds."

The reasoning and argument of the court was directed at Section 3 of Act 67 of 1884, which provides "that it shall be the duty of the city of New Orleans to turn over and transfer to the Board of Liquidation, immediately after the passage of this act, all the *property* of the city, real and personal," etc., for the purposes thereof.

But that section is entirely eliminated from *this* controversy, because the proof discloses that the respondent is in possession of no "property or funds" of the city which are applicable under that section to any of the debts of the city. The *sole* question here is, whether or not the Legislature had the power to dedicate the surplus of the premium bond tax to bonds that were to be issued under Section 2 of Act 67 of 1884. We are of the opinion that it had not.

In treating of the purpose and effect of the premium bond act we said, in the Rivet case, that the tax was denominated, "the premium

bond tax," and was separately mentioned on the tax rolls and in the tax receipts; and that the law "provided that any *surplus* arising from the requirements of the plan and all *drawn* series and premiums falling to the city should be used in the retirement of *outstanding bonds not funded into premiums*."

We styled this a legislative, reciprocal and synalogmatic contract between the city and her bonded creditors. R. C. C. 1765; 35 Ann. 134, Rivet vs. City of New Orleans.

Hence, it is apparent that the surplus of the premium bond tax, beyond the requirements of the holders of premium bonds, and in possession of the city, received *this particular distinction* by the premium bond act prior to the adoption of the Constitution of 1879.

This, the State for the city, had a perfect right to do. In the act of 1882 this contract was but re-affirmed and re-announced. It cannot be questioned now. The contrary provisions of the act of 1884 must yield and be treated and considered as not written in so far as they are concerned. The judge *a quo* correctly declined to make the alternative writ of mandamus peremptory.

Judgment affirmed.

CONCURRING OPINION.

FENNER, J. The most perplexing problem that has confronted this Court has been the adjustment of the rights and obligations of the city of New Orleans and her creditors under the State Constitution of 1879.

That constitution contained the broad provision: "No parish or municipal tax for all purposes whatsoever shall exceed ten mills on the dollar of valuation."

At the time of its passage the city owed debts exceeding twenty millions of dollars, arising mainly out of antecedent contracts, provision for which, in accordance with their stipulations would, at the time, have required an annual tax far exceeding the limitation fixed, leaving not a cent for the necessary support or alimony of the city.

Considering that the Constitution did not terminate the corporate existence of the city of New Orleans, but obviously contemplated its continuance as a going municipal corporation, the conclusion was irresistible that the ten mills tax authorized therein was designed, primarily and to the extent necessary, to be applicable to the support or alimony of the city, and that no creditor or other person could interfere with its appropriation to such purpose.

On the other hand, the State Constitution was utterly incompetent

surrendered and funded to the extent of \$13,000,000, and of which there are extant about \$8,000,000 at this time.

That the premium bond act provided that this bonded debt aggregating \$20,000,000, when exchanged for premium bonds of \$20 each, should be divided into 10,000 series of 100 bonds each, the whole to be numbered from 1 to 10,000. That a certain amount of those series should be annually paid, in pursuance of an allotment made from the numbers of all the series, and that premiums should be awarded on the bonds of the drawn series in a similar manner.

That, as all of said bondholders had not participated in the plan and funded their bonds, all of the series drawn at the different allotments did not pass into the hands of holders, but near \$8,000,000 thereof remained in the possession of the city; that the premium bond tax, to the extent it would have been applied to its proportion of the premium bonds, constituted, in contemplation of the premium bond act, a *surplus* represented by the *drawn* premium bonds in the possession of the city, and that this surplus was, by the terms of the act, dedicated to the payment of these unfunded bonds, or exchanged therefor.

That the bonds contemplated by the premium bond act were binding contracts between the city and bondholders, and the adequate and sufficient taxes dedicated to their payment by the laws under which they were issued were enforceable and valid.

That in 1882 the Legislature made further provision for those unfunded bonds by authorizing the issuance of another class of bonds therefor, known as extended consolidated and certificate bonds, to the payment of which an *additional* five mill tax was dedicated, and said surplus of the premium bond tax was pledged; that on the faith of said pledge and dedication \$5,000,000 of same were exchanged therefor, and are still extant, and solely dependent thereon for payment and to which they have a vested right.

That of said bonds there are remaining unfunded, under either act, \$3,000,000, which are *still* entitled to claim the benefits of both and to participate in said tax and surplus, and which right the Legislature by any *subsequent* act is impotent to impair or take away.

That, in pursuance of the statutes of 1876 and 1882, the city has levied and is annually levying a one per cent tax for the exclusive benefit of all of said bondholders, whether their bonds have been funded or not; and, as it is charged with the custody and application of the proceeds thereof, it is wholly without power to divert them to any other object.

That Act 67 of 1884 provides for the issuance of bonds into which

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are to be funded *judgment* or floating debts—as contradistinguished from *contract* or *bonded* debts—aggregating \$900,000 in amount, the greater part of which has been created since 1873, and no part of which was contracted prior to 1870, which was originally entitled to no special or sufficient tax for their payment, but which were wholly dependent upon the adequacy of the annual revenues for their discharge, and which are not entitled to participate in the one per cent tax.

That said act, in providing for an exchange of *drawn* premium bonds in the possession of the city for said floating debt bonds, undertakes, in effect, to appropriate to the latter *in advance of their maturities* the said surplus to the extent of \$200,000 annually, or \$500,000 for the time which has elapsed since the passage of the act, to the prejudice of the *contract* creditors of the city; and that this will the more clearly appear from the fact that respondent has in hand neither funds or property of the city—such as is mentioned in the act—with which to pay any part of said floating debt bonds.

That the amount of the premium bonds to be annually paid is annually increasing in value, and hence the proportion of the five mill tax applicable to the payment of each succeeding drawn series thereof is annually increasing to such an extent that the aggregate yearly excess is less than \$80,000; therefore, if *drawn* premium bonds in possession of the city are given in exchange for floating debt bonds to the amount required, not only would the surplus be consumed, but the proceeds of the premium bond tax would be absorbed, and the premium bond holders and the holders of bonds not funded would be deprived of the amount annually due them therefrom.

Finally, the respondent returns that the Act of 1884 is, in effect, an attempt to divert and misapply the one per cent tax in contravention of the pledges contained in prior laws, and, is enforced, contracts made in pursuance thereof will be impaired in the sense of the State and Federal Constitutions.

The Sun Mutual Insurance Company intervened and joined the respondent in resisting the enforcement of the Act of 1884.

It claims to be the holder of certain extended, consolidated and certificate bonds of 1882, and contends that, if said act is carried into effect, its contracts under various other and prior laws, enacted in 1852, 1854, 1869, 1870, 1871, 1873 and 1876—under which the bonds given in exchange were authorized and issued—as well as those under

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were proceedings for the enforcement of contracts other than bonds, or part of the floating debt, passed prior to the constitutional amendment of 1874.

In Rivet's case we said in analyzing the premium bond act: "It imposed on the Council the duty to levy annually a tax, * * which, after the year 1881, was to be at least one-half of one per cent; it provided that the tax so levied should constitute *a special fund to be used for no other purpose than the carrying out of the plan*; * * it provided that any surplus arising above the requirements of the plan and all drawn series of premiums falling to the city *should be used in the retirement of outstanding bonds not funded into premiums*."

In another part of the same opinion we said: "Under the law as it exists the city is *required* to invest the part coming to her in retiring unfunded *bonds*. If it be desired that such portion should be applied to the payment of interest on *bonds* other than premiums, and thus reducing the tax necessary to pay such interest, application should be made to the Legislature—certainly not to the judiciary."

From the foregoing, it conclusively appears that the premium bond tax was a special tax intended to create a special fund, dedicated and applicable, *ab origine*, exclusively to the then existing *bonded* debt of the city, so dedicated as a stipulation of a valid contract which neither the State nor city could impair; that its imposition and application affected in no manner the rights of other creditors, which remained precisely as if the act had never been passed; and that the unbonded creditors had not and could not acquire any right to, interest in, or control over the special fund arising from this special tax, because irrevocably dedicated exclusively to the bonded debt.

Now the Act 58 of 1882 was an exercise of the legislative power in exact accord with the suggestion made by us in the Rivet case above quoted, at least in so far as it dealt with the surplus of the premium bond tax and the drawn premiums held by the city. These special funds were applicable exclusively to the unfunded bonds, and nobody but the bondholders had any right or interest in them.

Any voluntary agreements between the city and the bondholders as to the disposition and application of these funds in accordance with their destination would be valid and binding, because they were the sole parties in interest and the only ones whose rights could be affected.

The Act 58 of 1882 is fully analyzed in the chief opinion just read, and it exhibits a contract between the city and her bondholders perfectly binding as to the application of the premium surplus and

drawn bonds, of which nobody can complain except non-consenting bondholders, who raise no voice against it, and which neither the city nor State can impair.

The attempt of the State, in the subsequent act of 1884, to divert these special funds to the satisfaction of the city's unbonded debt is a flagrant attempt to impair the obligations of antecedent valid contracts, which, we are very certain, the Supreme Court of the United States, with a proper understanding of the case, would never sanction, and which our duty, under both the State and Federal Constitutions, forbids us to countenance.

The floating debt of the city of New Orleans is divided into two classes: 1. That originating prior to the constitutional amendment of 1874. 2. That originating after said amendment.

The first class, so far as founded on contract, can suffer nothing by our decision herein, because it is entitled to satisfaction by taxation. Carrière's case, 36 Ann. 687; Marchand's case, 37 Ann. 14; Thorn's case, Id. 528.

The second class is not a *debt* of the city, at all, but a mere claim on the uncollected revenues of the years in which they were incurred, and entitled to satisfaction from no other source. Taxpayers' case, 33 Ann. 79; Gas Light Company's case, 37 Ann. 436.

It is, to say the least, doubtful whether the word *indebtedness*, as used in Art. 254 of the Constitution, embraces these claims, and whether, under Art. 45, the General Assembly has power to fasten such claim upon the city as debts. See Labatt's case, 38 Ann. 283.

But it is not necessary to consider these questions in this case, and they are only referred to for the purpose of showing that the major portion of the so-called floating debt dealt with in the act of 1884 is far from being equally *meritorious* with the bonded debt, or even equally binding in law.

All the judges concur in this opinion as well as in the chief opinion.

No. 9972.

H. & B. BEER ET AL. VS. DAVID HAAS ET ALS.

Property adjudicated at a sheriff's sale for taxes to a mortgage creditor, and subsequently retroceded with the formal agreement that matters will stand in the condition in which they were previous to the adjudication, can be proceeded against *via executiva* by the creditor to foreclose the mortgage, as though the tax sale and retrocession had never taken place.

Such creditor has the right to surrender possession of the property given him to extinguish the debt, by application of the fruits, and to have the property seized and sold to pay his claim, when he has not expressly abandoned that right or bound himself to retain possession.

Beer et al. vs. Haas et als.

A PPEAL from the Civil District Court for the Parish of Orleans.
Voorhies, J.

H. C. Miller for Plaintiff and Appellant; *G. A. Breaux* and *H. C. Miller* for Citizens' Bank, Intervenor and Appellant:

The renunciation by the creditor of the legal remedies to compel payment of his debt is not presumed, and never implied unless the implication is clearly evident.

The antichresis gives to the creditor the right to reap the revenues of the property of the debtor, for the payment of the debt, but the creditor, unless he has renounced the right, can always surrender the property and exercise his rights as a creditor; so in this case, if the act between the widow and heirs is deemed an antichresis, the bank had the right to give up the property and exercise its right of seizure and of sale. Civil Code, Art. 3176, 3178.

C. E. Schmidt for Defendant and Appellee; *White & Saunders* and *F. C. Zacharie* for Heirs of Zacharie, Appellees:

Acts of antichresis are to be interpreted by the courts most liberally in favor of the debtor, who will protect him from the rapacity of his creditor. 11 Peters, 390; 19 Howard, 569.

This is the rule of the common law in regard to the contract of *vivum vadium*, or Welsh mortgage, which corresponds to the antichresis of the civil law. Bouvier's Law Dict. *verba Vivum Vadium* and Welsh Mortgage; 1 Powell on Mortgages, 4; 373 Ann. 1079; 2 Powell, 1079; Merlin Question du droit "Faculté de Rachat."

The creditor who has received the immovable of his debtor in antichresis, may, at any time, abandon the pledge, and resort to the remedy on his debt, unless he has renounced the right of abandonment. R. C. C. 3178. The renunciation of this right may be express or tacit, and the latter may be gathered from the intention of the parties as shown by the whole act. Laurent XXVIII and notes. p. 539, and other authorities there cited: Zacharie (Aubry and Rau's Edit.) tom 3 p. 525.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is a suit to compel an adjudicatee to comply with his bid on certain real estate.

The defence is that the title tendered is not such as the defendant is bound to accept.

The appeal is taken by the plaintiffs from a judgment against them.

The material facts from which the litigation arises, are the following:

The Citizens' Bank was a creditor of J. W. Zacharie for a large amount, secured by mortgage on valuable property in this city.

After the death of Zacharie, the property involved in this controversy and other property was offered for sale by the sheriff, under an execution, for the payment of back taxes.

At that sale, which occurred in 1874, the bank became the adjudicatee.

In June, 1875, the widow and heirs of Zacharie and the bank executed an act whereby the claim of the bank was liquidated and the

property retroceded, possession being retained by the bank with a view to the extinguishment of the debt by application thereto of the rents and revenues.

It was stipulated, *ex industria*, that the object of the agreement was to place matters in the condition in which they stood before the sheriff's sale for taxes; but that the widow and heirs of Zacharie would, under no circumstance, be liable for the debt due the bank.

In the course of time, finding that her condition had not improved, and that it was her interest to foreclose her mortgage, the bank, in 1876, instituted proceedings to that end, against Widow J. W. Zacharie executrix and possessor.

Under the writ issued, the property was seized, advertised, and in August, 1876, adjudicated for \$54,000 to the bank, who retained the amount of adjudication, which was inferior to her claim, and she paid the costs and charges.

In 1881 the bank sold to the plaintiff part of the property thus adjudicated, and in May, 1884, the plaintiff caused it to be offered at public auction, when it was adjudicated to the defendant for \$20,000.

The validity of the title tendered having been questioned by the defendant, who declined to comply, the bank intervened, joining the plaintiffs, to affirm the title made them by her. On the other hand, the widow and heirs of Zacharie, brought in by the plaintiffs and by the bank, make common cause with the defendant.

The only question to be determined is simply :

Whether or not the title resided in the succession of J. W. Zacharie at the foreclosure of the mortgage.

The argument cannot be successfully urged that the bank cannot hold the affirmative, as she has undertaken to reconvey to the widow and heirs of Zacharie, the property adjudicated to her at the sheriff's sale for taxes, and as by the retrocession, the title passed from her to them, and was at the date of the proceedings, in them and not in the Succession of Zacharie.

The object of the act, to which allusion has already been made, was to adjust with the widow and heirs, the claim of the bank, to avoid the tax sale formally, and, as said, to place matters and persons in the condition in which they stood before the sheriff's tax sale.

The retrocession was designed for no other purpose than to show an express relinquishment of any title by the bank to the property in favor of the succession, represented them by the widow and heirs, who, at Zacharie's death, had become the joint owners of the property left by him and who had undertaken to champion its rights.

Beer et al. vs. Haas et als.

What title they acquired by the Act of 1875 was merely that which they held at Zacharie's death in 1870.

At that time the bank could well have issued executory proceedings against the succession of Zacharie (*Bank vs. Buisson*, 7 R. 506), and as the title was in it at the date of the seizure and sale, to foreclose, it is apparent that the bank had a right to proceed against the succession represented by the executrix. Indeed, she had no other alternative. R. C. C. 3181.

In such a case, it was unnecessary to make any other parties.

The objection that, by the agreement of 1875, a contract of antichresis was entered into, and that the bank had no right to surrender the property which formed the object of it, has no foundation.

The bank had a right to relinquish or abandon possession at any time, as she had not bound herself to retain it. R. C. C. 3178.

Viewing the agreement otherwise than as an antichresis, we do not find in its tenor, any obligation assumed by the bank to retain possession, until the debt be finally paid. Had such been the intention of the parties, they surely would have unequivocally expressed it.

The bank, besides, had hypothecary rights on the property, the exercise of which had not been, in any manner, suspended or affected by the agreement in question.

We, therefore, conclude that the title offered is such as the purchaser was bound to accept.

It is, therefore, ordered and decreed that the judgment appealed from be reversed, and that there be now judgment in favor of the plaintiffs and the Citizens' Bank, intervenor, rejecting the claim of the widow and heirs of J. W. Zacharie, declaring that the property described in the petition belongs to the defendant, David Haas, and condemning him to pay to the plaintiff the price of adjudication: Twenty thousand dollars (\$20,000) and interest, with vendor's lien and privilege and special mortgage on the property and according to the terms and conditions of the adjudications, as specified in said petition, and that the widow and heirs of Zacharie and the defendant, Haas, pay costs in both courts.

Rehearing refused.

Williams vs. Palace Car Company et als.

No. 10,008.

40 417
50 651**HENRY E. WILLIAMS VS. PULLMAN PALACE CAR COMPANY ET ALS.**

In dealing with matters of litigation growing out of the construction of railway law, in connection with railway accidents, the Supreme Court of Louisiana will endeavor to place its rulings in line and in harmony with the adjudications of the Supreme Court of the United States, and of the courts of last resort of the States of the American Union, in all cases in which they do not conflict with the special and exceptional system of laws prevailing in Louisiana.

In cases involving the responsibility of a common carrier, such as a railway company, for injuries sustained by one of its passengers, the porter, and other employees of a Pullman Car Company, forming part of the railway company's train, will be considered as the servants and employees of the railway company.

Their negligence, or the negligence of either of them, as to any matters involving the safety and security of passengers, while being conveyed, is the negligence of the railroad company. *Pennsylvania Company vs. Roy*, 102 U. S. 451; *Thorpe vs. N. Y. & H. R. R. Co.*, 76 N. Y. 402.

A railway company is liable in damages for a wanton and malicious assault by one of its servants on a passenger. 57 Maine, 202, *Goddard's case*.

A railway company is responsible for injuries received by one of its passengers at the hands of a porter of a sleeping car, forming part of the railway company's train, if it appears that said passenger was not a trespasser on the sleeping car.

A PPEAL from the Civil District Court for the Parish of Orleans.
Tissot, J.

W. S. Benedict and Read & Goodale for Plaintiff and Appellant:

Quoted the following authorities, viz. *Thorpe vs. N. Y. C. R. R. Co.* 76 N. Y. 402; *Case of Goddard*, 57 Maine; *Baltimore City Railroad Company vs. Kemp*, 61 Maryland 619; *Railroad Company vs. Fenney*, 10 Wisconsin, 388; 4 Gray, Mass. 365; *Penn. Railroad vs. Van Dives*, 42 Penn. State Rep, 365; *Weed vs. Panama*, 17 N. Y. 362; *Railroad Company vs. Derby*, 14 How. U. S. 468; *Pittsburg Railroad Company vs. Hinds*, 53 Penn. State. 513; *Woods' Treatise on Railway Law*, Vol. 2, p. 1179. 3 *Woods' Railway Law*, Sec. 366, p. 1422, the rule is stated to be that the railway company is liable for the acts of the servant of the sleeping car company, whose car is attached to its train, and it cannot shield itself from liability upon any ground, especially in cases where the whole train is under the management of the railway company. *Landeaux vs. Bell*, 5 Louisiana, 434; *Chamberlain vs. Chandler*, 3 Mason, U. S. Circuit Court Reports.

Percy Roberts and Farrar & Kruttschnitt for Defendant and Appellee.

The opinion of the Court was delivered by

POCHÉ, J. This appeal presents plaintiff's claim for damages against the Louisville, New Orleans and Texas Railway Company for personal injuries received by him at the hands of the porter of the Pullman Car Company, on the 23d of November, 1885, while he was a passenger of the railway company between Zachary station and Baton Rouge.

His demand was against both companies *in solido*, but on motion sep-

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arate trials were granted, resulting in a verdict in his favor against the Pullman Company, and in the other case in a verdict in favor of the railway company.

On appeal to this Court, the judgment in his favor and against the Pullman Company was reversed and his demand rejected. His present appeal is from the judgment below which rejected his demand against the railway company.

The pleadings and the evidence are the same in both cases, and as they are stated with precision and at length in our opinion in the first case, they need not be repeated here. (See *Henry E. Williams vs. Pullman Palace Car Company et als.*, No. 10,008).

It is in proof, and it is not disputed, that plaintiff had paid his fare, as a passenger on the defendant's train, and that he was as such entitled to all the privileges and to the protection which a common carrier or transporter owes to its passengers.

Defendant's main contention is that plaintiff was a trespasser in the Pullman car, and that he thereby forfeited his right to protection from the railway company, according to the terms of his contract of transportation.

Under our understanding of the issues presented by the pleadings, plaintiff's right of recovery against the railway company hinges upon the proper construction of the two following questions:

1. Can the railway company be held liable for the acts of an employee of the Pullman car company under any circumstances?
2. Was plaintiff a trespasser on the Pullman car when he was struck by the porter, or was he THERE entitled to the full protection of the railway company as one of its passengers?

I.

An extended review of decisions of American courts has brought to our attention several adjudications which hold the affirmative of the first question which we are called to discuss in this case.

In one of those decisions the following principle is announced:

"Passengers upon a railroad, taking a drawing-room car, have a right to assume that they are there under a contract with the railroad corporation, and that the servants in charge of the car are its servants, for whose acts in the discharge of their duty it is liable." 76 N. Y. Reports, *Thorpe vs. N. Y. & H. R. R. Co.*

The substantial facts of that case were: that a passenger on one of the defendant's trains, finding all the seats occupied in the ordinary or day coaches, walked into a drawing-room car, attached to, and forming part of, the train, and took a seat therein. When called upon by

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the porter to pay the extra charge for a seat in that car, he refused to pay the sum demanded for the reason that he could find no seat elsewhere; whereupon the porter attempted to eject him from the car, and for this assault he brought a suit for damages. On appeal from a judgment in his favor and against the railway company, the Court of Appeals of New York recognized his cause of action and enforced the liability of the railway company for the acts of the porter or employee of the drawing-room car company. Among other things the Court said:

"The general principle is well settled, that to make one person responsible for the negligent or tortious act of another, the relation of principal and agent, or master and servant, must be shown to have existed at the time, and in respect to the transaction between the wrong-doer and the person sought to be charged. The defendant relies upon the absence of this relation between the porter and the company as conclusive against its liability for his acts. But we are of opinion that this defense is not available to the defendant, or rather that the persons in charge of the drawing-room car are to be regarded and treated, in respect of their dealings with passengers, as the servants of the defendant, and that the defendant is responsible for their acts to the same extent as if they were directly employed by the company."

Sanctioning the same rule, the Supreme Court of the United States enforced the liability of a railway company for damages received by one of its passengers while he occupied a seat in a Pullman company car attached to the defendant's train. The accident had been caused by the falling on the head of the passenger of the upper berth of the sleeping car, and was due to the unsafe condition of the brace or arm which supported the upper berth, and which was afterwards found to be broken. *Pennsylvania Company vs. Roy*, 102 U. S. 451.

In dealing with the question which now concerns us, the Court said:

"The undertaking of the railroad company was to carry the defendant in error over its line in consideration of a certain sum, if he elected to ride in what is known as a first-class passenger car; with the privilege, nevertheless, expressly given in its published notices, of riding in a sleeping car, *constituting a part of the carrier's train*, for an additional sum paid to the company owning such car.

"As between the parties now before us, it is not material that the sleeping car in question was owned by the Pullman Palace Car Company, or that such company provided at its own expense a conductor and porter for such car, to whom was committed the immediate control of its interior arrangements. The duty of the railroad company was to convey the passenger over its line. In performing that duty, it

could not consistently with the law and the obligation arising out of the nature of its business, use cars or vehicles whose inadequacy or insufficiency, for safe conveyance, was discoverable upon the most careful and thorough examination. * * * For the purposes of the contract under which the railroad company undertook to carry Roy over its line, and, in view of its obligation to use only cars that were adequate for safe conveyance, the sleeping car company, its conductor and *porter, were, in law, the servants and employees of the railroad company.* (Italics are ours.) Their negligence, or the negligence of either of them, as to any matters involving the safety or security of passengers while being conveyed, was the negligence of the railroad company."

In a case predicated on similar facts the Supreme Court of Ohio applied the same rule. *Columbus R. R. Co. vs. Walrath*, 38 Ohio St., 461.

Commenting on the preceding, and other, adjudications, Wood, in his work on *Railway Law*, has formulated the rule as follows:

"The practice of running trains controlled by two separate and distinct corporations has become quite common in this country, and as a result, questions as to the relative liability of these corporations will be likely often to arise."

It has been held in several cases that when a passenger has purchased a ticket of a parlor-car company, entitling him to ride in its car, and also a passage ticket of the railway company, the railway company is to be regarded as liable for the negligence of the palace car company; and that its servants are to be treated as the servants of the railway company in everything that regards the safety and security of the passenger. *Wood's Railway Law*, p. 1442, Sec. 366.

Believing that in a question of such vast importance, on matters of litigation likely to arise in all parts of the American Union, this Court should seek to place its rulings and jurisprudence in line and in harmony with those of the Supreme Court of the United States and of the courts of last resort of our sister States, wherever those decisions do not militate against the principles of our special and exceptional system of laws, we deem it our duty, without hesitation, to adopt the conclusions which so clearly flow from the highly respectable authorities to which we have just referred, and from which we have thought it proper and useful to make the foregoing copious quotations.

Applied to this case, in which it appears that the Pullman car was attached to the defendant's train, under the same circumstances, rules and regulations, and for the same purposes as shown in the cases

hereinabove mentioned, the rule of law thus sanctioned leads to the legal conclusion that for the purposes of this contention, the porter of the sleeping car, by whom Williams was stricken down and injured, must be treated as being at the time a servant or employe of the defendant company, and as such entrusted with the duty of contributing in the performance of his legitimate duties, to the safety and security of the passenger which the railway company had undertaken to carry safely over its line.

Hence it follows that the railway company must be held liable for injuries sustained by one of its passengers through the negligence or fault or other acts of the porter in question. And, under well established jurisprudence, it is equally clear and logical that such liability extends to and embraces injuries inflicted on the passenger by means of a willful and malicious assault by a railroad employe on the passenger.

That responsibility is the subject of a very able and masterly discussion by the Supreme Judicial Court of Maine in the case of *Goddard*, 57 Maine, p. 202, in which a passenger was allowed exemplary, as well as compensatory, damages for gross insults heaped upon him by a brakeman on the train on which he was then travelling. In that opinion, from which we made copious extracts in our previous decision, (No. 10,008), the Court enforced the rule that "a common carrier of passengers is responsible for the willful misconduct of his servant toward a passenger."

"A passenger who is assaulted and grossly insulted in a railway car by a brakeman employed on the train, has a remedy therefor against the company."

In *Pennsylvania R. R. Co. vs. Vandiver*, 42 Pa. St., 365, the railway company was held liable for injuries inflicted on a passenger by a violent ejectment from the train.

A like responsibility was decreed against the railroad company for injuries sustained by a lady passenger in a general fight between drunken passengers in the coach in which she occupied a seat, on the ground that the conductor had not used the proper means to quell the disturbance. *Pittsburg, Ft. W. and C. R. R. Co. vs. Hinds*, 53 Pa. St. 512.

Our own jurisprudence has sustained an action by a lady passenger against the owners of a vessel for insulting and abusive language used to her and about her by an employe of the common carrier. The principle is thus summarized in that opinion: "The master of a vessel is liable for the indecent and inhuman conduct of himself and of his crew, excited by him towards a passenger."

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"Owners of vessels carrying passengers for money, are subject to the same responsibility for a breach of duty by their officers to the passengers, as they would be in regard to merchandise committed to their care." Keene vs. Lizardi et als., 5 La., 431.

✓ We therefore conclude that the case is with plaintiff unless it should appear that he was a trespasser on the Pullman car when the incident occurred resulting in his injuries.

II.

And this brings us to the consideration of the second question involved in the controversy. Under the result of our examination of the evidence as announced in our previous opinion, this question offers no difficulty in the present case.

We said on that subject: "We do not lose sight of the fact that plaintiff was not a trespasser, but had a right to enter the car for the purpose of asking permission to wash his hands, or of trying to have the privilege, and that in addressing the porter he was dealing with him as a servant of the company."

A second examination of the record has had the effect of confirming the correctness of that conclusion.

The preponderance of the evidence on that point, although very conflicting, shows to our entire satisfaction that plaintiff did ask permission of the porter to wash his hands, and that after an exchange of a few unpleasant words, the porter struck him on the head with a blunt instrument, while plaintiff was standing at the threshold of the door of the Pullman car. He was stunned by the blow, which felled him to the platform, whence he was picked up and brought to the forward car by one of his friends. His testimony as to the main features of the incident is corroborated by that of two other witnesses, although no witness saw the whole incident.

Hence we conclude that the attack was unprovoked, unjustifiable and willful on the part of the porter, for whose conduct the defendant company must be held liable in damages.

As the Pullman Car Company, the immediate and direct, employer or master of the wrongdoer, has been shielded from responsibility by our previous decree, the case may be a hard one on the defendant, but under the authorities by which we have been guided, the hardship appears inevitable. Our ruling in that case rested on the pivotal feature that there existed no contractual relations between plaintiff and the company. Our conclusions find ample support in the decision of the case in 76 N. Y., hereinabove referred to, in which the railway company was made to respond for the ejection of a passenger from the

Spotorno vs. Fourichon.

drawing-room car, in which he claimed the right of occupying a seat without paying therefor.

On this point we quote from the opinion of the Supremé Court of the United States in Roy's case, 102 U. S. 458, the following utterances:

"Whether the Pullman Car Company is not also and equally liable to the defendant in error, or whether it may not be liable over to the railroad company for any damages which the latter may be required to pay on account of the injury complained of, are questions which need not be here considered. That corporation was dismissed from the case, and it is not necessary or proper that we should now determine any question between it and others."

Under all the circumstances of the case we hold that plaintiff is entitled to recover damages in the sum of one thousand dollars.

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled, avoided, reversed and the verdict of the jury set aside, and it is now ordered that plaintiff do have and recover judgment of the defendant, the Louisville, New Orleans and Texas Railway Company, in the sum of one thousand dollars, and for costs in both courts.

No. 10,004.

LOUIS SPOTORNO VS. AUGUST FOURICHON.

Under the law of Louisiana slander is a *quasi* offense, actionable under the broad provision of the Code: "Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it."

If the words are false, injurious and uttered *malò animo*, they are actionable.

Both malice and injury may be inferred from the nature and falsity of the words.

Under the existing social habits, customs and prejudices, considered simply as facts, charging a white man with being a negro, is calculated to inflict injury and damage to the

knowledge of all persons, and no one can so make and circulate such a charge without knowing its injurious effect and intending to injure, if he knew that the charge was false. Such charge was recognized as actionable slander by this Court under the Constitution of 1868. 21 Ann. 308.

A PPEAL from the Civil District Court for the Parish of Orleans.
Houston, J.

F. Michinard for Plaintiff and Appellee.

Branch K. Miller for Defendant and Appellant.

The opinion of the Court was delivered by

FENNER, J. This is an action for slander by falsely and maliciously asserting and circulating the report that plaintiff was a negro. Under

40	438
45	969
40	423
47	910
40	423
48	914
40	423
51	968
40	423
52	1374
40	423
115	985
40	423
116	968

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our laws slander is a *quasi* offense, actionable under the broad provisions of our Code, which declares: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."

Our courts are not bound by the technical distinctions of the common law as to words actionable *per se*, and not actionable *per se*, and allowing for the latter only actual pecuniary damage specially proved. *Miller vs. Holstein*, 16 La. 389; *Feray vs. Foote*, 12 Ann. 894

If the charges are false, injurious and made maliciously or *malo animo*, they combine all the elements essential to support the action.

Both the damage or injury and the malice may be inferred from the nature and falsity of the words and from the circumstances under which they were uttered without the necessity of special proof. *Miller vs. Holstein*, 16 La. 389; *Daly vs. Van Benthuyssen*, 3 Ann. 69; *Fresch vs. Maddox*, 11 Ann. 206; *Cass vs. N. O. Times*, 27 Ann. 214.

Under the social habits, customs and prejudices prevailing in Louisiana, it cannot be disputed that charging a white man with being a negro is calculated to inflict injury and damage. We are concerned with these social conditions simply as facts. They exist, and for that reason we deal with them. No one could make such a charge, knowing it to be false, without understanding that its effect would be injurious and without intending to injure. This was treated as an actionable slander by the court organized under the Constitution of 1868. *Foye vs. McMahon*, 21 Ann. 308.

Defendant admits that plaintiff is a white man, and defends only by denying that he ever made the charges alleged.

We have considered and weighed the evidence and can find no reason to reverse the conclusion of the district judge that the proof is sufficient.

It is claimed that the evidence of one witness should not be considered, because the facts testified to by him occurred more than a year before the suit, and were, therefore, within the prescription pleaded. This is doubtful; but, if true, the evidence would be entitled to weight as corroborating the testimony of the other witnesses who proved like statements within the prescription term.

We think the record affords no ground for disturbing the moderate damages allowed.

Judgment affirmed.

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No. 10,104.

GEORGE SARPY ET AL. VS. ADÈLE HYMEL ET AL.

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124	512
124	516

Prescription does not run against the exercise of a servitude of drainage established by a police jury in pursuance of Section 6 of the act of 25th of February, 1813, on Bonnet Carré point and adjacent lands, in favor of one of the proprietors of an estate included in the system ordained, who participated in its establishment and afterwards resisted and prevented its repair and improvement,

A servitude having been established under the police power, conferred by that statute, its control continues to reside in the police jury; neither party to it can prevent or oppose its repair or improvement; no individual can go, at his pleasure, on the premises or estate of another and make repairs or improvements of such servitude he may deem necessary; and such repairs or improvements can be made in pursuance of the authority and ordinances of the police jury only.

An appellee who has not filed a timely motion or prayer for an amendment of the judgment appealed from can obtain no relief on appeal.

A PPEAL from the Twenty-sixth Judicial District Court, Parish of St. John the Baptist. *Rost, J.*

Henry Denis for Plaintiffs and Appellees:

The police jury is empowered, under the provisions of acts of 1813 and 1814 (Rev. Stat., Sec. 2743), to ordain and establish the draining of the lands of Bonnet Carré point. 5 Ann. 424.

Police juries have the exclusive right, under those laws, to determine how lands within the points on the Mississippi river should be drained, without regard to their relative position as superior and inferior estates. 6 Ann. 97.

The courts will presume that the police jury exercise such power properly and judiciously. 12 Ann. 534.

Such power is a delegation of the police power of the State. It remains in force as long as it is not withdrawn by the State. It is as complete and sovereign in the municipal corporation as in the State itself. 39 Ann. 252; Cooley Const. Limit., p. 713 *et seq.*; Dillon Munic. Corp., 1 vol., 166 *et seq.*

The provisions of the code on the subject of servitudes do not apply to works of public or common utility. C. C., Art. 665.

Berault & Ohenet on the same side.

T. J. Semmes and Legendre for Defendant and Appellant:

The code divides servitudes into natural, legal and conventional.

Natural servitudes result from the relative position of estates; legal servitudes arise from the law, and conventional servitudes from contracts.

The code does not recognize the "police power" as a source of servitude.

A conventional servitude, operating on real estate, is a real right, a *jus in re*, and as such does not affect third persons unless recorded. C. C. 2266; Demolombe des Servitudes, No. 733; Aubry & Rau, Vol. 3, p. 75; Mourlon, Traité de Transcription, Nos. 115, 119; Lamarcis, Com. des Servitudes.

A right of servitude may be lost by non-usage for ten years. C. C. 3546-789; 34 Ann. 616; 15 Ann. 427; 1 R. 391.

In cases of non-usage of continuous apparent servitudes, prescription begins to run from the day that an act contrary to the servitude has been committed. C. C. 790; Duranton, Vol. 5, No. 685; Demolombe des Servitudes, No. 1009; Toullier, Vol. 3, No. 692; Aubry & Rau, p. 105.

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When the prescription of non-usage is opposed to the owner of the estate to whom the servitude is due, it is incumbent on him to prove that he or some person in his name has made use of the servitude as appertaining to his estate during the time necessary to prevent prescription. C. C. 723; 15 Ann. 427; Toullier, Vol. 3, Nos. 659 661; D. 39, L. 3, T. 12-30.

The lower estate is subject to the charge of receiving the waters that flow naturally from the higher estate. This servitude results from necessity and the laws of vicinage. 15 Ann. 681-497; 4 Ann. 168; 19 L. 351; 12 L. 504.

The opinion of the Court was delivered by

WATKINS, J. Plaintiffs are the widow and heir of Delord Sarpy and the owners of the Glendale plantation, having derived title from Norbert Rancon; and the defendant is the owner of the Gold Mine plantation, having derived title from Thomas May.

These plantations are contiguous estates, and situated in close proximity to Bonnet Carré point, on the Mississippi river, and this controversy involves their mode of drainage.

The plaintiffs' contention is that the police jury, in pursuance of a special statute, established a plan or system of drainage for said plantations and others on Bonnet Carré point, and that defendant's author accepted same and bound her to it.

They seek the recognition and maintenance of the servitude of drainage thus established, and in support of it plead, *acquiescendo causa*, the prescription of ten, twenty and thirty years.

The defendant denies the establishment of a servitude—legal, conventional or otherwise—on her property in favor of the plaintiffs' property; and also denies the construction and ownership of a ditch in common between the two estates.

She avers that the ditch described in the plaintiffs' petition was constructed to drain lands other than those of plaintiffs, and that said ditch was never completed.

In the alternative, she avers that, in case the servitude claimed is found to have existed, same has been lost by *non-usage* for ten years and by the renunciation and remission thereof on the part of the plaintiffs and their authors.

In reconvention she claims that plaintiffs' lands are lower than hers and are subject to a natural servitude in favor of hers, and are bound to receive the waters that flow naturally from her lands. That, contrary to law, plaintiffs have erected dams and embankments at the boundary line of respondent's estate, which obstruct the natural flow of the waters from her lands, and thus interfere with the servitude due by plaintiffs estate to her own.

The record discloses the following salient facts, viz :

That the Gold Mine plantation has a front on the Mississippi river, which, at that place, flows due east to the extreme point of Bonnet Carré, and that from that point it flows due south, passing in front of Glendale plantation.

That Glendale extends back from the river in a due west course to a point at which it intersects the rear line of Gold Mine, which extends back from the river in a due south course ; the boundary line between them being a diagonal one extending from northeast to southwest.

The two plantations are situated at right angles with each other and constitute the west and south boundaries of Bonnet Carré point, while the river constitutes the north and east boundaries.

This intervening space is sub-divided into quite a number of plantations, which are owned by a number of different proprietors—all of which are separated from the swamp in the rear.

The natural course of their drainage is in a southwesterly direction, and that results, in part, from the fact that they are more elevated, and, in part, from the formation of a crevasse on the upper side of Bonnet Carré point. In consequence thereof both the rain and river waters, at high tide, were precipitated upon Glendale, to its great injury and damage.

Originally the course of Bayou Toné and that of some small coolies was from the river alone in a southerly direction across the central portion of Glendale, and that of Bayou Roussi from the river alone in a southwesterly direction diagonally across the rear portion of Gold Mine. From the latter there was an outlet which passed through the rear portion of Glendale.

In pursuance of Section 6 of the act of March 25, 1813, the police jury undertook the adjustment of the drainage of these different estates ; and on the 3d of June, 1850, adopted an ordinance in which provision was made for the appointment of a committee having authority to examine "the locality of Bonnet Carré point and adjacent lands," and with full authority "to open and clean out Bayou Toné and Bayou Roussi, situated on said point, down to the lower limit of the parish."

It was therein "resolved that the opening and cleaning of said bayous shall be at the common expense of the proprietors of the land forming Bonnet Carré point."

At a subsequent meeting of the police jury the committee made a report in which they recommended the dredging and cleaning of Bayou Toné, the cutting of a new ditch or canal from Bayou Tone to Bayou

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Roussi, the digging and cleaning out of the latter as far as its junction with the Rancon canal, behind the Gold Mine plantation, at that time owned by May, and thence continued until it reached the swamp and "Bayou Pin" in the rear.

On the 1st of April, 1852, the committee entered into a contract with Pat Phelan "to have the Bonnet Carré point and adjacent lands drained and to make the canals and drains necessary for the same." He completed the construction of the canal from Bayou Toné to Bayou Roussi, dredged and deepened the latter, and completed the canal beyond Bayou Roussi to its intersection of Rancon canal; but he failed to complete about nine or ten arpents of the canal at the lower or outer end, which was necessary to make it reach Bayou Pin. Phelan brought suit against the police jury for a balance due him, and it resulted in a compromise whereby Phelan realized the full amount of his contract of \$4000, less \$650. It remains in that condition to this day.

This canal was denominated Company canal. It was begun at a point on the upper or northern boundary line of Glendale, a little east of where Bayou Toné intersects it, thence extended west on that line to its intersection of the eastern boundary of Gold Mine, and thence across Gold Mine until it intersected Bayou Roussi and made connection therewith.

Through this canal the waters of Bayou Toné and the drainage waters from the plantations on Bonnet Carré point were passed into Bayou Roussi and thence into the swamp in the rear of Gold Mine and Glendale, and by this means Glendale was relieved from distress and overflow during high water.

It appears that, at present and during the last several years, that portion of Bayou Roussi that intersects Gold Mine plantation and unites with Company canal has become obstructed with decayed vegetable matter, weeds and willow trees, and has become partially filled with dirt by means of the cultivation of its banks for a series of years, so that the flow of water into it from Company canal is retarded and the water backed up and thrown upon the plantations on Bonnet Carré point and Glendale, whereby the latter is frequently overflowed.

It thus appears that, if Bayou Roussi was opened and the water permitted to flow through it from Company canal, Glendale would be entirely relieved and Gold Mine would suffer little, if any, injury.

Because of the obstructions in Bayou Roussi and the defendant's objection to its being cleaned and deepened, the plaintiffs have

brought this suit for the recognition and re-establishment of Company canal and the deepening of Bayou Roussi.

It is a fact—one evidenced by this statement—that Glendale is now, and has been for many years, exclusively drained by means of Rancon canal, which extends from the river west, on its southern boundary, to the swamps in the rear. There is but little difference in the altitude and inclination of Glendale or Gold Mine, and there is but a small portion of the latter so situated as to naturally receive drainage from the former.

But, as an additional protection, one of plaintiffs' authors caused to be constructed, in 1828, a line of levee along the northern boundary of Glendale, and also upon the boundary line between it and Gold Mine, and the same has been since maintained. Company canal was constructed parallel with it on its northern boundary.

During the stress occasioned by high water and threatened overflows, plaintiffs and their authors have frequently felt constrained to open small culvert in these levees so as to pass a portion of the water through and thus obtain partial relief.

With Bayou Roussi thus obstructed, Bonnet Carré point and Glendale suffer from annual overflows, while Gold Mine has no serious interruption of her drainage.

Bayou Roussi has been constantly treated as a part of Company canal by the proprietors of plantations on Bonnet Carré point, and also by the plaintiffs and their authors, and they have frequently exercised the right to clean it of grass and weeds without objection on the part of the proprietors of Gold Mine. But the defendant has steadily refused to have it dredged or deepened.

This question of drainage has been a mooted one between the proprietors of Glendale and Gold Mine plantations for a great many years, and in 1850, prior to the establishment of Company canal by the police jury, there was litigation between Thomas May and Norbert Rancon, the object of which, on the part of the former, was to coerce the drainage of Bonnet Carré point and Gold Mine over Glendale, and to compel Rancon to demolish and remove the levee and embankments that had been established fifteen or twenty years before. To this pretension Rancon made resistance on the *identical* grounds on which the plaintiff predicates his present suit. Hence, it is necessary to examine the report of that case, and see what bearing it has upon the present controversy.

Vide, Thomas May vs. Norbert Rancon, 5 Ann. 424. The defendant, among others, made the following defences, viz :

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"That the natural flow of the water along the line of the levee complained was in a direction parallel with it. That the levees or dams complained of have existed for more than fifteen years without any opposition from the plaintiff or his vendors, and that he has waived, by his silence, any rights he might have.

"That the said levees were not constructed with the intention of arresting the natural flow of the waters on plaintiff's land, but for the purpose of *counteracting* the effect of two wide draining canals now existing on his estate, which accumulate the water in large quantities, raise it above its level, and force it with great rapidity through his land. That those canals extend far beyond the cultivated lands of the plaintiff; that they change the natural course of the waters, and should not be permitted to continue open.

"That the *coulées* through which some of the water that falls on the plaintiff's land and finds its way on defendant's estate, are the result of crevasses, and cannot be considered natural drains."

That paragraph clearly shows that the issues in this case are identical, except in so far as the condition of things has been changed since the construction of Company canal.

That suit was tried by a jury who found for the defendant, and the plaintiff appealed. On the hearing in this Court the discovery was made that there had been improperly admitted, over the defendant's objection and exception, certain incompetent evidence, and, consequently, the verdict and judgment were set aside and the cause remanded.

As a means of solving the difficulty presented, the Court took occasion to recommend the parties to seek relief under the provisions of section 6 of the Act of March 25, 1813.

The pertinent provision of that act reads as follows, viz: "When a point of land on the Mississippi or other water course shall be divided among several proprietors (and), it shall be found necessary to dig one or more common draining ditches, the said (police) juries shall have the power to ordain that said ditches be dug *at the expense of said lots*, and that the expense be borne by a contribution among said owners, to be *levied* in such manner as the said juries shall respectively prescribe."

The Court then proceeded to say:

"Those powers are ample to meet the present case and to remove all the difficulties which are shown to exist in relation to draining the point of Bonnet Carré.

"We, therefore, earnestly recommend the parties to this suit to

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avail themselves of the provisions of this law, and not to force us to make a decision which *may be injurious to both*. The police jury have the right to determine how lands *situated as these are*, shall be drained *without regard to their relative position*, and if any rational system of drainage be ordained by them, it shall be respected and enforced by us."

That decision was rendered in May, 1850, and it was in pursuance of this recommendation by the Court that the police jury ordained and established Company canal, as above described.

The decision, as well as the ordinances themselves, leave no doubt in our minds of the fact that both Glendale and Gold Mine plantations were specifically included in this plan or system of *artificial* drainage—not, possibly, as a part of Bonnet Carré (point, but as "adjacent lands" in like situation.

In so deciding, the Court only followed the precedent established in the case of *Martin vs. Jett*, 12 La. 501, and to which special reference is made as authority for their decision.

It has been followed by the case of *Walsh vs. Arnous*, 6 Ann. 97, in which the same recommendation was made by the Court.

In *Avery vs. the Police Jury of Iberville*, 12 Ann. 554, the Court upheld the constitutionality of the Act of 1813.

Neither the law nor the authority of the police jury has been questioned since, and it is manifest that the defendant and his authors acquiesced in the construction of Company canal—indeed, it is in proof that May paid at least one-half of the assessment made against Gold Mine by the police jury for the purpose of constructing it.

There was a clause in the Act of March 3, 1814, which is explanatory of section 6 of the Act of 1813, "saving to individuals or persons aggrieved the right of complaining for the making or opening of such natural or artificial drainings, when * * hurtful to them, before any court of competent jurisdiction, as in case of a common civil action."

Under the evidence in the record, the defendant is estopped from gainsaying or disputing the existence of Company canal, or that Bayou Roussi forms a part of it. Her author bears quite as much of the responsibility for it, if not more, than any one else, because it was his suit against the former proprietor of Glendale that brought it into existence.

There is no sufficient evidence in the record to show any relinquishment or abandonment of this canal on the part of plaintiffs or their authors. On the contrary, the proof is that the rain and overflow

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water from Bonnet Carré point passes through the upper portion of Company canal, but that same is *partially* obstructed in its flow through Bayou Roussi in its course to that portion of the canal below Gold Mine. Hence, the provisions of the Code relied upon by the defendant are not applicable. R. C. C. 815, *et seq.*

For like reason the servitude has not been extinguished by non-usage, and it is not prescribed. R. C. C. 789, 790.

Indeed, prescription could not run against the exercise of a right of servitude when the person pleading prescription has resisted and prevented its exercise, as defendant has done in this instance. R. C. C. 792.

The judge *a quo* held "that the servitude having been established under the police power of the parish authorities, the control of the common canal or ditch, known as the 'Company canal,' still remains in the police jury; that neither can the defendant prevent or oppose the digging or cleaning of any portion of the canal through which the servitude has been established, nor can the plaintiffs, or other individuals, go, at their pleasure, on defendant's land, without her consent, for the purpose of digging or improving the condition of the drainage canals, and that such improvements must be done by order of the police jury on such terms and in such manner as they may think proper."

These observations are eminently wise and correct, and should be enforced.

We are of the opinion that the system of *artificial* drainage, which was established by the police jury, was for the mutual benefit and advantage of the proprietors of estates on Bonnet Carré point and others adjacent thereto, including Glendale and Gold Mine, and that they are entitled to the full and complete exercise and enjoyment, but only through the parish authorities, as herein intimated.

But the record discloses that Company canal has never been so extended as to form a connection with "Bayou Pin" in the rear, as originally ordained by the police jury. We are of the opinion that it is but justice and equity to the defendant that it should be completed, and that the judgment should be amended in this respect.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from be so amended as to require the police jury, in case they determine to enforce this decree, to cause, at the same time, the Company canal to be extended so as to form a connection with "Bayou Pin," and that, as thus amended, said judgment be affirmed.

It is further ordered that the costs of appeal be taxed against the plaintiff and appellees.

ON APPLICATION FOR REHEARING.

POCHÉ, J. Plaintiffs charge two serious errors to their detriment in our decree :

1. They urge that having found the law and the facts in their favor, as declared in their pleadings, we should have granted them the relief which they had prayed for ; and that therefore we should have absolutely recognized their right to enter on defendant's lands for the purpose of cleaning and deepening the "Bonnet Carré Company Canal," or, in the alternative, the defendant should have been condemned to make those improvements herself.

Such was the purport of the prayer of their petition. But the part of our decree complained of in this regard, was simply in affirmance of the judgment rendered by the district court, which subordinated the recognized right of plaintiffs to clean and deepen the canal to the action and control of the parish authorities.

Now, plaintiffs are appellees from that judgment, and they have not made a motion or prayer for an amendment of the same. It is elementary, under the rules of our jurisprudence, that we are powerless to amend the judgment in their favor. Hence that feature of the decree must remain undisturbed.

2. They next complain of that part of our decree which amends the judgment appealed from so as to "require the police jury, in case they determine to enforce this decree, to cause, at the same time, the Company canal to be extended so far as to form a connection with "Bayou Pin."

A second examination of the whole case has led us to the conclusion that we had committed an error on that point, superinduced by an allegation in defendant's answer to the effect that said Company canal or "ditch was never completed or finished."

Our second consideration of the pleadings and of the evidence has satisfied us that that allegation formed no issue in the case ; no prayer was predicated thereon, and no contestation on the trial grew out therefrom.

The record does show that the canal contracted for by the police jury was contemplated to have been extended to *Bayou Pin*, and that this has never been done. But, in point of fact, the only issues which were tendered by the pleadings, and which were tried and disposed of in the district court, were the contested right of plaintiffs to claim any legal title to, or protection and advantage from, the Company canal as dug and made under the authority of the police jury ; and the recon-

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ventional demand of defendant to exercise her alleged right of natural servitude of drainage over plaintiffs' lands.

It appears to our satisfaction from the evidence that a proper dredging and cleaning of the "Company canal," including that portion of the same known as "Bayou Rousse," throughout its entire length as made under the contract with the police jury, would afford all the relief which plaintiffs claim and contemplate, without injurious effects to defendant's lands and drainage.

Hence we conclude that the judgment appealed from was as favorable to her as the nature of the case could admit of, and that she was entitled to no relief at our hands.

We therefore deem it our duty to re-open the case with the sole view of setting aside that portion of our decree which amended the judgment in favor of appellant. To that end we shall recast our decree in full.

It is therefore ordered that our previous decree herein be annulled and set aside, and it is now ordered that the judgment of the district court be affirmed at appellant's costs.

Rehearing refused.

No. 10,153.

STATE EX REL. BARTHET VS. JUDGE DIVISION B, CIVIL DISTRICT
COURT PARISH OF ORLEANS.

The Supreme Court will not interfere with inferior courts in cases of contempt, when it is found that such courts exercised a jurisdiction vested in them, that the decree rendered was a proper exercise of judicial power, and that disobedience of such order was punishable as a contempt.

In such cases it has no concern with the question whether the act charged was or not committed, or did or not constitute a contempt, and will not review the facts on which the lower court acted to punish for contempt.

A PPLICATION for Certiorari.

F. Michinard for Relator :

Villavaso vs. Walker, 24 Ann. 213; Matter of Vanderbilt, 4 Johnson's Chancery, R. p. 37; State vs. Harvey, 14 Wisconsin, 151; Case of Lafon's Hen., 3 U. S., 713; Arts. 1011 and 1012, C. P.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is an application for a *certiorari*. The complaint of the relator is that the district judge has arbitrarily sentenced

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him for contempt for having violated an injunction which at the time of its alleged infraction had ceased to have any existence.

In his return, the district judge sets forth reasons for his justification.

The prayer is that the validity of the proceedings attacked be considered, and that the sentence be annulled to all purposes.

It appears that the district court, in 1885, issued an injunction to prevent the defendant (relator) from carrying on the business of a slaughter-house, within certain limits; that on appeal the injunction was declared by this Court, in 1887, to have properly issued, because the defendant had undertaken to continue the business, after the revocation of the previously obtained permission to do so, from the proper authority; that since the injunction was perpetuated, the defendant obtained in 1888, from the City Council an ordinance permitting him to carry on the business within the limits in which he had first done so; that the defendant having engaged in carrying on a slaughter-house within said limits, the plaintiff took a *rule* on him, to show cause why he should not be punished for contempt for violating said perpetuated injunction, and that the defendant pleaded in justification, the ordinance allowing him to do so.

The district judge heard the rule and came to the conclusion that the acts of the defendant were committed in contravention of the injunction which had not ceased to be in force. He therefore sentenced him, for contempt, to ten days' imprisonment.

Having been confined, in furtherance of the sentence, the relator applied for relief in this Court and a restraining order was made suspending the execution of the sentence, until the further order of this Court, and the relator was provisionally released.

The writ of *certiorari* issues to an inferior judge, only to ascertain of the validity of proceedings before him. C. P. 855.

Such proceedings, in cases of contempt, can never be annulled, unless the court had no jurisdiction or judicial power to make the order disobeyed, or disregarded the rules of procedure prescribed by law in proceeding to punish for contempt.

Hence it is, that, when it is found that the court had such jurisdiction and power and has proceeded in the manner and form required by law, the proceedings must remain unaffected, however erroneously the court may have determined the issue before it.

It has consequently been uniformly held, by this Court, that, under an application for a *certiorari*, the *intrinsic* correctness of the judgment complained of, could never be considered, where the court had such

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jurisdiction and power and exercised it in the proper form, and that the inquiry, where the court had such jurisdiction and power, must be restricted to the extrinsic correctness of the decree.

The law, in clear terms, says, that the writ issues to ascertain the validity of the proceedings; that is, their apparent correctness.

In the present instance, it is indisputable that the district court had jurisdiction to issue the injunction, for thus, this Court found. *Villavaso vs. Barthet*, 39 Ann. 247.

It is indisputable, also, that having such jurisdiction, it had the power to enforce it and coerce, by proper means, obedience to its behest; that is, to punish, on observing the forms of law, the violator of the prohibition of the injunction. C. P. 130.

In a kindred case, this Court said: "All courts possess the inherent power of bringing to their bar and punish for contempt of their authority, not only the parties to the litigation, the jurors, the witnesses, the officers of the court, but also offenders not connected with the controversy, whenever they impede or obstruct the process of the court, disturb its proceedings, insult its officers or commit any act which interferes or thwarts its administration of justice.

"Each court has necessarily the power of determining for itself, whether the act or acts thus done constitutes or not a contempt of its authority, and when it has exercised that power and passed sentence, in the manner and form prescribed and within the limitations fixed by law, it does not appertain to this Court, as a rule, to inquire into the facts passed upon, with a view to ascertain and determine whether a contempt was or not committed and to release the offender.

"The regular ruling of a judge on a question of contempt, is no more revisable than his regular ruling in an unappealable case.

"It is an essential, privileged and significant attribute which should be exercised with independence; but with discretion and dignity.

"It is unfortunately possible, that forgetful of his mission of peace and conciliation, a magistrate may palpably ill use that conservative power, so as to become reproachable with oppression in office; but in such instances, rarely to occur, the question of abuse of authority cannot be determined and remedied against by the process now sought." *State ex rel. O'Malley vs. Judge*, 35 Ann. 1197; also, *State ex rel. Brown vs. Houston*, *Ib.* 1194.

To these conservative views we adhere.

From the papers before us, it appears that the proceeding for contempt was by rule, contradictorily tried with the defendant therein, who is the relator here. This was the proper proceeding, the offense

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charged not having been committed in *faciem curiæ*, in which case a rule is not necessary.

Another complaint of the relator is that the district judge, in order to pass upon the rule for contempt, had to determine whether the permission obtained was or not valid; that he has done so, and that his judgment will constitute *res judicata* on the trial of such an issue when presented in the case itself.

There exists no room for such apprehension. When that matter will be presented in proper pleadings, the district judge will have full power to change his views should he determine that he erred in entertaining them when deciding the rule for contempt. The relator may, besides, rest certain that, under no contingency, will that ruling bind this Court, as *res judicata*, should the validity of the permission granted, pleaded in justification, ever be submitted to its consideration.

Finding, therefore, that in issuing the injunction, the court exercised a jurisdiction vested in it; that the injunction was a proper exercise of judicial power; that disobedience of such an order was punishable as a contempt, and that the proceedings were regular, we conclude that, as we have no concern with the question, whether the act charged was or not committed, or did or not constitute a contempt, we are powerless to grant the relief sought.

It is, therefore, ordered and decreed that the restraining order herein made *in limine* be rescinded and that the application herein be refused with costs.

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No. 10,053.

SUCCESSION OF PIERRE DÉJAN—JULES VICTOR AND ARTHUR DÉJAN
VS. MRS. JOSEPHINE SCHAEFFER, WIDOW PIERRE DÉJAN.

The collateral attack by simple heirs on the validity of a judgment of separation of property between a deceased husband and his surviving wife, must be restricted within the same limits which would circumscribe an attack made by the husband himself, if he were alive.

Creditors and forced heirs alone, in a collateral manner, justify an inquiry into the validity of such judgments on their merits.

Simple heirs at law derive their rights from the husband or wife, as the case may be, and can institute no attack and no inquiry which would not be opened to the deceased, under whom they claim, if he or she were alive.

In such a case the inquiry must be restricted to an examination to ascertain whether the court which rendered the judgment had jurisdiction, and whether it exercised that jurisdiction according to the forms of proceeding established by law.

To create a community sought to be dissolved at the instance of the wife, there must be a

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lawful marriage, but it is immaterial whether the particular marriage declared upon be valid or not, provided it be shown that there was a lawful marriage between the parties. All the property purchased by a wife duly separated in property from her husband, after the date of the judgment [of separation, becomes her separate estate, to which the husband or his heirs at law can lay no claim.

A PPEAL from the Civil District Court for the Parish of Orleans, *Tissot, J.*

D. C. & L. L. Labatt and Thos. J. Semmes for Plaintiffs and Appellants :

1. Federal authority is powerless to control prohibited marriages between white and black citizens of a State. 34 Ann. 269. Therefore, Art. 95 C. C. 1825, preserved its original force until November 14, 1870, so that a civil marriage on the 18th of February, 1869 was null and void and no community resulted, to be dissolved by any court of justice. *Succ. Colwell*, 34 Ann.; 4 Wash. 371; 12 Wall. 430; 11 Wall. 76; 1 Woods, 537, 169; *id.* 80; 48 Cal. 36; 48 Ind. 337; 21 Ohio St. 198; 53 Ala. 150; 42 Ala. 125, 525; 106 U. S., *Pace vs. Ala.* 585; 27 Vt. 749; 11 Pat. 102.
2. The Act of 1868, No. 210, relative to ecclesiastical marriages, is exceptional, and did not authorize justices of the peace to confirm religious marriages between persons of opposite color. Neither did the State Constitution of 1864, 1868, the Civil Rights Bill of 1866, or the 14th Amendment, contemplate a repeal of that prohibition. By that act, a confirmation of a religious ceremony established a retroactive community from the date of the ecclesiastical marriage, unless other stipulations are "embodied in the act," and no subsequent separate act of the husband can produce a modification of the community. (Act of '68, No. 210.) Moreover, Act No. 210 is pregnant with a legislative affirmation that Art. 95 was not previously repealed by Federal authority or State Constitution, as held by the court *a qua*. 34 Ann. 269. *Succ. Colwell*!!
3. "When the community of acquets and gains is dissolved by death, the respective interests of the survivor and of deceased spouse attach, at the moment of the dissolution, to the property of the community. This right will be recognized if sued for in the proper action, and may be enforced at any time, when demanded by a partition of the property or otherwise, even when burdened with the usufruct in favor of the survivor." *Tugwell vs. Tugwell*, 32 Ann. 849; 5 Rob. 12.
4. "When the surviving spouse files an answer denying the existence of a community and asserts title to the property withheld from the succession by separate acquisition, after its dissolution upon a judgment of court, and relies solely on that record, as her muniment of title, the proceedings and record are not "*res judicata*," and their verity must be supported by satisfactory evidence *aliunde*. Such a judgment is at most the beginning of proof, and plaintiff is bound, in such suits, to verify clearly the facts on which it was based." 19 Ann. 97, 250; 10 Ann. 87; 8 N. S. 459; 4 L. R. 257, 422; 11 R. 336; 12 L. R. 296; 4 Ann. 135; 31 Ann. 405; 4 Anz. 71; 11 R. 536; 13 Toullier, No. 69, 73 and 75; 11 Ann. 697; 8 N. S. 240; 4 R. 325; 14 Ann. 684; 15 Ann. 33, 81; 17 Ann. 113; 23 Ann. 164; 24 Ann. 280.
5. "The cases in which the *onus* is on the judgment creditors are those in which wives have obtained judgments against their husbands. They are exceptions to the rule that he who alleges fraud must prove it." 2 Ann. 544; 6 Ann. 631; 1 Rob. 431; 10 Ann. 272; 7 Ann. 93, *Webb vs. Peet*.
6. Where a wife confirms a judgment by default, against her husband, which presents on its face all the concomitants and *indicia* of a collusive voluntary separation, prohibited by the Civil Code, it is null and void, even as between the "parties themselves." 11

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- Ann. 647; Biret Null, 1 Vol. 146, 147, 149, 376, 377; 7 Toullier-Duvergier, p. 13; 14 Ann. 619; R. C. C. Art. 2427 (3401); C. N. 1443; 9 Ann. 168; 10 Ann. 688; 15 Ann. 81. The Code says, to be valid, "It can only be ordered by a court of justice after hearing all parties." R. C. C. 2427 (3401).
7. The marital action of the wife is not accorded or governed by the Code of Practice, but is provided for in the Civil Code, and is controlled by different rules from ordinary suits, and is to be pursued *bona fide* on pain of nullity. Arts. 2428, 2427, 1429 R. C. C. Execution cannot issue until after publication of the judgment for three months, in order to exclude the suspicion of collusion or fraud. 12 Merlin Rep. pp. 414, 417, 419.
 8. Where a litigant, in a petitory action, elects to stand upon a title of acquisition, she cannot be allowed, during the progress of the trial on that issue, to shift her ground and set up title by inheritance, in order to prostrate and defeat the action of the law. 4 Ann. 416, Conner vs. Gridley.
 9. Since the Act of 1844, and in its incorporation as Art. 915, R. C. C., the former construction of Art. 923 (O. C. 917), that it was governed by the exception in Art. 924 (918) has been changed and modified so that a surviving spouse no longer outranks natural brothers, but in lieu thereof holds such share in usufruct, subject to two conditions, death or second marriage, and the naked title vests in the natural brothers and sisters or their descendants immediately. Art. 923 (917); Art. 915 R. C. C., new Article.
 10. The last expression of legislative will, in Act of 1844 and Art. 915, R. C. C., must predominate over the jurisprudence previous to its passage, and this Court is bound by the unambiguous terms of that statute, and discharges firmly its highest duty in the administration of justice when it enforces its plain words. 9 Ann., Succ. of Lee; Tajaoco case, 6 L. R.; 5 Rob. 12.

Frank D. Ohretien and P. E. Theard & Sons for Defendant and Appellee :

After the adoption of the Constitution of 1868, white and colored persons could inter-marry. The prohibition to that effect, contained in Art. 95 of the Civil Code of 1825, being obliterated by said Constitution.

A judgment of a competent court cannot be enquired into collaterally; its decrees directly on the points reviewed are, as a plea of evidence, conclusive between the same parties, or those claiming under them, for the same thing, and can be corrected, if erroneous, only by a direct action in nullity or by appeal.

A judgment of separation of property and of dissolution of the community, obtained by the wife in 1876, cannot be attacked by persons claiming to be collateral heirs of the husband after his death in 1886. On those points the judgment is final and irrevocable, and became so by the silence of the husband during his life time and by the uniform recognition of the validity of said judgment by both parties, in many acts and proceedings.

The wife is called to the inheritance of her husband before his natural brothers. The plaintiffs have therefore no interest in the succession of their natural brother. R. C. C. 917 (911); R. C. C. 919 (913); R. C. C. 924 (918); R. C. C. 929 (923); Victor vs. Tagiasco's Executor, 6 L. 644; Succession of Duclosange, 2 Ann. 98; Succession of Duclosange, 1 Ann. 181; Manette and Virginie Duplessis vs. Betsey Young, 11 Ann. 120; Succession of Briscoe, 2 Ann. 268; Succession of Miller, 27 Ann. 574, 575.

The Act of 1844 relative to community property has not changed the order of succession. The wife inherits in full ownership, and not in usufruct only, where there are no lawful relations. Succession of Lee, 9 Ann. 398; Succession of M. Brinkman, 5 Ann. 27; Succession of Odille Hebert, 5 Ann. 122; Succession of Fitzwilliams, 3 Ann. 489.

The provisions of the Act of 1844 are merged in Articles 915 and 916 of the R. C. C., under

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the title of irregular successions. The whole of the chapter treating of irregular successions is one law. There is no conflict between its provisions. In default of lawful relations, the wife is called first to the succession of her husband, the natural relations next, and the State after. There is especially no conflict between Article 915 and Article 924 of the R. C. C. They provide for different cases: Succession of Duclosange, 2 Ann. 98; R. C. C. 915 to 933; Layre vs. Pasco, 5 R. 11 and 12; Lacleotte's Heirs vs. Labarre, 11 L. 181.

But simple heirs cannot disturb a separation decreed after citation to the husband, duly published and followed by an execution, and subsequently and uniformly recognized by both parties thereto, in many acts and proceedings. Compton vs. Maxwell, 33 Ann. 685; Brown vs. Stroud, 34 Ann. 374; Kerwin vs. Hibernia Insurance Co., 35 Ann. 33; Chaffe & Sons vs. De Moss, 37 Ann. 186.

The decree of separation is valid; it was rendered by a competent court, after due citation; it rests on clear and positive evidence; it was published and executed according to law; even if the money demand is erroneous, the separation is good, because the wife had an industry of her own, and the chief object of a judicial separation is to emancipate her industry, to enable the wife to conduct her business, to earn a livelihood for herself and her family. R. p. 288, *et seq.*; Chaffe & Sons vs. Watte, 37 Ann. 324; Davock vs. Darcy, 6 R. 342; Webb vs. Peet, 7 Ann. 93; Holmes vs. Barbin, 15 Ann. 554; Penn vs. Crockett, 7 Ann. 343; Raiford vs. Thorn, 15 Ann. 81; Henderson vs. Trousdale, 10 Ann. 548; Wolf & Clark vs. Lowly, 10 Ann. 272.

A community dissolved by a judicial separation cannot be re-established in Louisiana. Ford vs. Kittredge, 26 Ann. 193 and 194.

A wife may employ her husband as clerk, agent or manager, under her immediate control and authority; the fruits of her property belong to her, not to them jointly. Miller vs. Handy, 38 Ann. 160.

In a petitory action plaintiff must make out his title; he cannot rely on the weakness of his adversary's title. Young vs. Chamberlin, 15 Ann. 451, Pritchett vs. Coyle, 22 Ann. 57.

The evidence shows that all the real estate in controversy was acquired by purchase by Mrs. Déjan since her separation, by authentic acts, in the execution of which she was authorized and assisted by her husband; and such acts cannot be destroyed by mere verbal and uncertain evidence; nor can they be questioned by the plaintiffs, who are neither forced heirs nor creditors, and who stand in the place of their deceased brother Compton vs. Maxwell, 33 Ann. 688; Kerwin vs. Hibernia Insurance Co., 35 Ann. 33; Chaffe & Sons vs. De Moss, 37 Ann. 186.

The opinion of the Court was delivered by

POCHÉ, J. Plaintiffs, suing as the natural brothers of Pierre Déjan, deceased, claim, as his only heirs at law, the naked ownership of the property belonging to him, as forming part of the community alleged to have existed between him and his surviving wife, up to the day of his death, on the 30th of October, 1886, he having left no children and no will.

The defense is that there is no property belonging to the community which once existed between Pierre Déjan and his widow; that said community was dissolved by the judgment of a competent court rendered on April 24, 1876, in execution of which the defendant bought in all the property which then stood in the name of her husband; and

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that all the property, one-half of which is claimed by plaintiffs, is her own separate estate, earned, acquired and purchased by her since the dissolution of said community.

That defense prevailed below, and plaintiffs appeal.

From the record it appears that the pivotal question in the case is the alleged absolute nullity of the judgment of separation of property rendered at the instance of the wife in April, 1876.

The pertinent facts are as follows :

Pierre Déjan, who was a colored man, and Josephine Schaeffer, widow Paul Krack, who was a white woman, began to cohabit together as man and wife in 1858; and being under existing laws (O. C. C., Art. 95) incapacitated from contracting a lawful marriage, they had recourse to a religious ceremony or marriage in order to sanctify their union, which took place on September 1, 1858. On the 18th of February, 1869, they appeared before a justice of the peace and contracted what they understood, and what purported to be, a lawful marriage. But, for reasons which are not apparent in the record, the parties went before a notary public on June 4, 1869, and ratified the private or religious marriage of 1858, in accordance with the provisions of Act No. 210 of 1868.

On the same day and before the same notary, Pierre Déjan made a declaration to the effect that at the time of his marriage with Josephine Schaeffer in September, 1858, she possessed in her own right the sum of \$28,000, which she had acquired during her widowhood by her industry and through lucky circumstances.

It appears that up to that time she had been employed as house-keeper or servant by a family in this city, and that subsequently she assisted her husband or consort in his labors as a small dealer in furniture, his business consisting for some time mainly in purchasing, repairing and reselling second-hand furniture.

The business prospered and was soon transformed into a considerable furniture store, carried on in the name of Pierre Déjan. But he met with reverses, and in 1876 he was heavily indebted and greatly embarrassed, in consequence of which his wife brought a suit against him, for the restitution of her personal funds, in the sum of \$28,000, and for a separation of property, averring, among other allegations, her ability and desire to carry on a furniture or grocery business, and her fears of losing the fruits of her earnings through the embarrassed condition of her husband's affairs and in the confusion of his losses, resulting from speculative ventures.

After personal citation on the husband, a default on his failure to

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answer, and after other due proceedings, trial and proof of the wife's demand, judgment was rendered in her favor as prayed for. After publication execution issued, and at the sale made thereunder, property of the husband, aggregating some \$11,000, was adjudicated to the wife. That sale included the furniture store, which the wife has since carried on in her own name and as her separate industry, being therein assisted by her husband, who filled the functions of salesman and general clerk. In addition to the property thus and then acquired, Mrs. Déjan has since purchased considerable immovable property in her own right, as separate in property from her husband, by whom she was in every act of sale authorized and assisted.

Plaintiffs' contention is that the judgment of separation of property of April 24, 1876, is absolutely null and void, fraudulent and collusive, and that it covers a consent judgment and voluntary separation between the spouses prohibited by law, and that, therefore, the community existing between the spouses was not dissolved before the death of Pierre Déjan in October, 1886, and that all the property purchased in the name of the wife fell in the community.

The main ground of that contention is that the marriage of February 18, 1869, on which Mrs. Déjan had declared in her suit for separation of property was itself an absolute nullity, for the reason that the legal incapacity which impeded a lawful marriage between the parties had not yet been removed, and that, therefore, no community could flow from such an abortive attempt of marriage, as without a lawful marriage there can be no community of acquets and gains. Plaintiffs then contend that the only lawful marriage existing between Pierre Déjan and Josephine Schaeffer was that of September 11, 1858, as legalized by the notarial act of June 4, 1869, under the provisions of Act 210 of 1868, from which they argue that, under that statute, the community between the spouses dated and took effect from September, 1858, and not from February 18, 1869, as fraudulently alleged by the wife and as decided by the court in the decree rendered in her favor.

That theory is first antagonized by plaintiffs' pleadings, in which they allege that Déjan and his wife had been married on February 18, 1869, which averment was admitted by the defendant in her answer, thus judicially settling the status of the spouses and closing out all contestation or discussion thereon between the same parties.

Plaintiffs could not complain of being subjected to a rule of practice which, in another branch of the case, they invoke against their opponent, and which announces the doctrine as follows: "We understand

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it to be a rule in the administration of justice that a man shall not be permitted to deny what he has solemnly acknowledged in a judicial proceeding, nor to shift his position at will to a contradictory one in relation to the subject matter of litigation, in order to prostrate and defeat the action of the law upon it." (4 Ann. 416).

But, as they urge, in argument, that they took the date of the marriage from the wife's petition in the suit for separation of property, by which they had been led into an error, we are disposed to give them the benefit of a doubt, and to release them from the rigor of the rule, preferring to rest our decision of the cause on other considerations.

Now, as their whole theory rests not only on an admission, but actually on the argument that Déjan and his wife were legally married when the judgment of separation of property was rendered, it is undeniable that there did exist a community of acquets and gains at the time that the suit was instituted. Hence, naturally flows the conclusion that the judgment was not a nullity, on the ground that it purported to dissolve a community, which had no legal existence, and, therefore, the community, which avowedly existed, must have been dissolved by the judgment, unless it turns out to be null and void on other grounds.

It is apparent, and it is not denied, that the court which rendered it had jurisdiction *ratione materiae et personae*, that citation had been issued and served, that issue had been joined by default, that a trial was had, proof administered and considered, and that after such hearing, judgment was rendered and signed in open court, that publication of the same was made and that execution was issued thereon.

Upon the face of the papers the judgment is valid. Can it be attacked collaterally? The law and jurisprudence answer that it may, but only by creditors and forced heirs whose rights would be affected thereby. And such an attack, even as restricted to creditors and forced heirs, is itself an exception to the general rule which shields the binding force and effect of judgments from collateral attacks.

As plaintiffs stand before the Court as collateral or simple heirs, it is elementary that they can urge no other claims and direct no other attack but those which the deceased could himself advocate in his own behalf if he were alive.

If, therefore, it were true, as contended by plaintiffs, that Mrs. Déjan did not and could not own, in her own right at the time of her union with the deceased, in 1858, the enormous sum of \$28,000, for

Succession of Déjan.

which she obtained judgment in 1876, it is clear that, after solemnly acknowledging the fact in a notarial act in 1869, after having knowledge of the proof made thereof on the trial of the suit for separation of property, after quietly submitting to the execution of judgment predicated on that fact, and after acquiescing therein for ten years Déjan could not be allowed, in a collateral attack, to impair the full force of such a judgment. It is equally clear that his simple heirs at law, who claim under him, who can exercise no rights but those which are derived from him, have no better standing in Court for the same purpose and for the same line of attack, than he could himself command.

Whence could they derive a right to complain, being neither creditors nor forced heirs, even if it were apparent that the deceased tacitly or actively produced the result which they desire to avert? As to them, the judgment which they seek to avoid is protected from a collateral attack not only by reason and law, but by the authority of numerous adjudications of the Court, going back to the early history of our jurisprudence.

In the case of Kerwin vs. Insurance Co., 35 Ann. 33, this Court, in dealing with the pretensions of certain heirs who sought to claim, as belonging to the community, property which had been purchased in the name of the wife, with the assistance and authorization of the husband, denied the right of the husband or of his legatees or simple heirs to avoid the effect of such a contract, and it added:

"Only creditors and *forced heirs* are excepted from this rule, and the latter to the extent of their *légitime* only and for the purpose of protecting the same."

A similar claim was presented in the case of Brown vs. Stroud, 34 Ann. 374, in which the Court, guided by the same doctrine, used the following words: "The plaintiff claiming only as an object of his (the deceased) bounty, being neither creditor nor forced heir, has and could have, no better right than the testator possessed, and we clearly see that he had none."

The case of Compton vs. Maxwell, 33 Ann. 685, is directly in point, presenting a collateral attack by heirs on a judgment of separation of property between their ancestors. As in this case, the plaintiff there denied that the community between the spouses had been dissolved, and this Court said:

"We find in the transcript the entire record of a suit instituted in the name of Mrs. Compton against her husband, * * * in which judgment was rendered in her favor on a moneyed demand, and decreeing

a dissolution of the community. This judgment was rendered after citation to the husband, was duly published and followed by an execution on which there was a return of *nulla bona*. The separation of property purporting to be established by the judgment was subsequently and uniformly recognized by both parties thereto by many acts and proceedings. This recognition is shown by the purchase of property in the name of the wife, * * * in some of which purchases the husband joined to authorize her." * * *

"Surely, all these facts must to the legal mind, outweigh the uncertain evidence afforded by the parol testimony of the mother of the plaintiffs and one of the plaintiffs themselves, contradictory of that derived from those acts and judicial proceedings, and by which such solemn acts and proceedings of the parties are sought to be overthrown. Under our settled jurisprudence, the effect of authentic acts and judicial proceedings cannot be so easily impaired, nor titles to real estate resulting therefrom, or evidenced thereby, so easily destroyed." * * *

"In the face of these acts and proceedings, it would hardly be contended that Thomas A. Compton, if alive, could be listened to in asserting a claim to this property. His heirs, claiming through him, stand in no better condition."

See, also, *Drumm vs. Kleinman*, 31 Ann. 124; *Stewart vs. Mix*, 30 Ann. 1036; *Hebert vs. Lege*, 29 Ann. 511; *Barbet vs. Roth*, 16 Ann. 271; *Renford vs. Thorn*, 15 Ann. 81; *Henderson vs. Trousdale*, 10 Ann. 548; *Wolf vs. Lowry*, 10 Ann. 272; *Penn vs. Crockett*, 7 Ann. 343; *Darock vs. Darcey*, 6 R. 342.

From our uniform jurisprudence the following rule may be culled and must be considered as resting on most solid foundations:

"Barring the exception in favor of creditors and forced heirs, touching judgments of separation of property between husbands and wives, the inquiry on collateral attacks against the validity of judgments "must be restricted to an examination to ascertain whether the court which rendered the judgment had jurisdiction, and whether it exercised that jurisdiction according to the forms of proceedings established by law. No inquiry can be made as to the correctness of the judgment upon the merits." *Pasteur et al. vs. Lewis & Lynd*, 39 Ann. 5.

Under the effect of principles so well settled in our jurisprudence, it becomes immaterial, for the purposes of this decision, to determine whether the marriage of February 18, 1869, was null or valid. It is conceded that there existed a legal marriage between the parties to

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the suit for separation of property; hence, there was a community which the wife was seeking to dissolve, and that community was dissolved by the judgment of April 24, 1876. Beyond this no inquiry can be made into the judgment, which is valid upon the face of the papers. The validity of the judgment cannot be impaired by the assertion, even if true, in point of fact, that the moneyed judgment in favor of the wife was in amount in excess of what it should have been.

We, therefore, conclude that all the property subsequently earned and purchased by Mrs. Déjan became, and remains to this day, her personal and separate estate, and that plaintiffs' claim must be rejected.

Having reached those conclusions, we find no warrant for a discussion of numerous other points made in the case and presented with marked ability and great learning by counsel, both in their oral argument and in their briefs.

Judgment affirmed.

Rehearing refused.

No. 10,060.

B. R. FORMAN VS. NEW ORLEANS AND CARROLLTON RAILROAD COMPANY.

Under the Constitution and laws of the State of Louisiana the city of New Orleans is clothed with full and exclusive power to grant franchises for the construction and operation of passenger street railways, by steam or horse power, within her corporate limits, including the right of regulating the rates of fare to be exacted by said corporations for the transportation of passengers.

The city's discretion in regulating such matters is not subject to judicial control or interference, unless arbitrarily or unlawfully exercised.

That feature of the contract between the city and the New Orleans and Carrollton Railroad Company, which exacts from the public a fare of ten cents from Carrollton to Canal street, except from actual residents above Napoleon avenue, who can on certain conditions make the trip for five cents, is not subject to attack as an unreasonable discrimination prohibited by the law governing the obligations of common carriers.

A PPEAL from the Civil District Court, Parish of Orleans.
Houston, J.

E. H. McCaleb and W. F. Mellen for Plaintiff and Appellant.

J. M. Bonner for Defendant and Appellee.

The opinion of the Court was delivered by

POCHÉ, J. Plaintiff complains that he was illegally ejected from one of defendant's cars, for which he claims damages in the sum of

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45	1370

40	446
e122	7
122	12
f122	13

\$5000, and he prosecutes this appeal from a judgment which rejected his demand.

The following are the salient facts in the case :

The contract under which the defendant obtained its present franchise was framed under the provisions of two ordinances of the City Council of New Orleans, which contained the specifications under which the right of way was to be sold to the company, among which was the following :

" FARE.—The rates of fare from Canal street to the head of Jackson street and the Napoleon avenue station, and points between, shall be (5) five cents, and (5) five cents beyond Napoleon avenue station, between the hours of 4 A. M. and 12:30 P. M., except to actual residents above Napoleon avenue, who shall have the privilege of purchasing through tickets at the rate of ten for fifty cents. The fare between 12:30 P. M. and 4 A. M. to be charged shall be (10) ten cents to Napoleon avenue, and (10) ten cents from there to Carrollton."

In compliance with that stipulation the company procured tickets in bunches of ten each, which it has been selling exclusively, at least knowingly, to actual residents above Napoleon avenue, designed as explained in the opinion of this Court in the case of *De Lucas vs. Railroad Company*, 38 Ann. 931.

It appears that plaintiff, who does not reside above Napoleon avenue, obtained a bunch of such tickets from a person who was an actual resident above that street and attempted to ride on one of those tickets from the corner of Second and St. Charles streets to Carrollton. At Napoleon avenue, where the change of cars is effected, he tendered for his fare thence to Carrollton one of the coupons of the tickets in question, which was refused by the collector, on the ground, as acknowledged by plaintiff, that he was not a resident above that avenue. Being called upon to pay the regular fare, and persisting in his claim to pay the same by means of the ticket, plaintiff was ejected from the car.

It appears that on two previous occasions plaintiff had tendered similar tickets for his fare at the same point, which had been refused, but that, in order to avoid an unpleasant contestation, the employee of the company had himself paid plaintiff's fare in currency, as required by the rules of the company.

The crucial point in the case is the contested right of the company to make the discrimination, hereinabove described, in favor of actual residents above Napoleon avenue, which is alleged to be unjust, unreasonable and violative of the legal obligations of the defendant

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company as a common carrier. Hence, the main relief claimed by plaintiff is a decree condemning the defendant to sell to him and other persons, residing below Napoleon avenue, tickets on the same terms and conditions which are extended to actual residents above Napoleon avenue.

It appears, as above stated, that the discrimination complained of does not emanate from the railroad company, but that it was imposed on it as a condition of its franchise by the city.

The leading feature of that stipulation is a limit of the maximum rate which the company can exact for fare between the points therein designated. Under its requirement the company cannot obtain a higher rate than ten cents between Canal street and Carrollton, or five cents between Carrollton and Napoleon avenue, and between Canal street and Napoleon avenue, or the foot of Jackson street, and intervening points.

It is shown that during the existence of a previous corporation, which operated a road on the same street between Carrollton and "Lee Circle," several blocks above Canal street, the rate of fare was twenty-five cents each way.

Hence the complaint is not that the rate which is charged to plaintiff and to the public in general is excessive or unreasonable, but the contention is that plaintiff and all persons who do not reside in this city above Napoleon avenue are placed at a disadvantage in comparison with actual residents above that avenue.

Under our law, touching the powers of the city of New Orleans, as expounded in jurisprudence, it clearly appears, and it is not even disputed, that the city is clothed with the full and exclusive power of granting franchises for the construction, operation and running of railroads over the streets, as well as the power of fixing a tariff of rates to be exacted by all such corporations.

Act No. 20 of 1882, which was the city charter then in force, gives to the Council the power "to authorize the use of the streets for horse and steam railroads and to regulate the same, to require and compel all lines of railway or tramway to use any one street, to run on the same track and turn-table, to compel them to keep conductors on their cars," etc. *Brown vs. Duplessis*, 14 Ann. 842; *Board of Liquidation vs. New Orleans*, 32 Ann. 917; *Harrison vs. N. O. Pacific R. R. Co.*, 34 Ann. 462; *Tilton vs. Railroad Co.*, 35 Ann. 1068; *Railroad Company vs. N. O.*, 39 Ann. 709.

But, conceding all these powers to the city of New Orleans, plaintiff

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contests the right of the city to make the discrimination complained of.

That argument suggests the question of the right of the judiciary to interfere with the discretion of the city in dealing with matters which the laws of the State have placed within its exclusive control and management. The question came up in the case of *Watson vs. Turnbull*, reported in the the 34th Annual, p. 856, in which the Court, after a full review of all previous authorities bearing on the point, said :

“ Within the corporate limits, the city of New Orleans, under her charter and under the general law, has the right to control, manage and administer the use of the river banks for the public convenience and utility, to establish wharves and landings, to erect works and provide facilities for the use of vessels and water craft, and to charge a just compensation for the use thereof. Riparian proprietors have no right to appropriate to their exclusive use these banks, and they have no private property in the use thereof, which is public. The discretion of the city authorities in determining what are proper and needed facilities for commerce, and on what part of the river bank, within her limits, they should be established, is manifestly not a subject for judicial control or interference.”

The views of that opinion, which are supported by numerous previous adjudications, were re-affirmed in the cases of *Pickles vs. McLellan Dry Dock Company*, 38 Ann. 412, and *Villavaso vs. Barthet*, 39 Ann. 247.

Plaintiff's argument that the question must be tested under the general law governing and determining the obligations of common carriers is grounded on the provisions of Article 244 of the Constitution, which reads :

“ Railways heretofore constructed, or that may hereafter be constructed, in this State are hereby declared public highways, and railroad companies common carriers.”

Without deciding that street railroad companies are not common or public carriers, in the general sense of the term, we feel very certain that they were not within the contemplation of the convention in adopting that article.

As streets of a city are, and have at all times been known to be, public highways, it cannot be supposed that because railroad tracks were laid thereon it required a constitutional declaration to the effect that they were public highways.

But, construing that article in connection with Articles 243, 245 and

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46 of the same Constitution, it is manifest that the article was not intended to have the slightest reference to street railways, and that as to them the municipal power to regulate, manage and control their construction and operation was not intended to be affected, altered or modified by any provision of the Constitution.

Article 243 recognizes the general power of building railroads in the State and of connecting them with railroads of other States; and regulates the manner of one road intersecting another, and of transporting each the other's passengers, etc., without delay or discrimination.

Article 245 requires all railroad corporations doing business in this State to have and maintain public offices in the State for the transfer of stock and for the transaction of other dealings connected with their stock.

It requires no argument to show that in all these references to railroad corporations the convention did not intend to include street railroads.

But the intention to leave the subject matter to the municipal authorities, to which they had always been relegated, is removed beyond the domain of discussion by Article 46, which provides:

"The General Assembly shall not pass any local or special law on the following specified objects: * * * Authorizing the construction of street passenger railroads in any incorporated town or city." * *

Now, as no legislation has yet been enacted in furtherance of any of the articles above referred to, so as to subject street railroads to the same rules, it is absolutely safe to conclude that nothing therein contained can fairly be construed as impairing the exclusive control of the city of New Orleans over all the street railroads heretofore constructed or that may hereafter be constructed within her limits, and that such power includes the right of fixing the tariff of fares to be charged for the transportation of passengers.

No one is heard to complain of the act of the city in fixing the maximum rate which can be charged for fare on all the street railroads, including the defendant, which are now under operation in the city. The complaint would be as fruitless as is that of plaintiff in the present controversy.

It is an undeniable proposition that the authority of the City Council in the premises is as effectual and binding as would be a similar provision emanating from the Legislature itself.

Now, in our examination of the numerous authorities quoted by counsel, and in which unreasonable discriminations made by common

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carriers were rebuked and avoided, we find that none of the acts complained of had any direct or indirect legislative authority, but that, on the contrary, they antagonized either the general or common law governing the obligations of common carriers, or some special law applicable to the subject matter.

The regulation which is here charged to be an unreasonable discrimination, far from being violative of a special law, is directly sanctioned by legislative authority. More than that, it is embodied in and forms part of a solemn authentic contract between the city and the defendant company. And the Court is urged to cancel and abrogate a contract which the city had the undisputed power to make, and in a proceeding in which she is not even a party.

According to the contract, the established rate of charges for all persons is ten cents between Canal street and Carrollton each way, the exception being in favor of actual residents above Napoleon avenue.

Hence it follows that if any unreasonable discrimination can be charged to the scheme, it must be attributed to the exception, and not to the general rule; and, therefore, the judgment rendered could not benefit plaintiff, but would materially injure a class of people which the city intended to protect.

It was unquestionably within the discretionary power of the City Council in regulating the defendant's road to consider that, as the commercial centre of the city, the great majority of churches, schools, banks, courts and other institutions were clustered in the neighborhood of the centre of the city, and almost all below Napoleon avenue, it was simply an act of justice to actual residents above Napoleon avenue in the pursuit of their daily avocations and for other equally necessary purposes to enable them to reach the central portion of the city with the same facilities and at the same cost which were afforded to all other residents of the city.

It is settled in jurisprudence that all discriminations are not unjust, unreasonable or oppressive, and that they are, therefore, not all reprehensible.

In the case of *Hays vs. Pennsylvania Co.*, 12 Federal Reporter, p. 311, cited by plaintiff, it was said: "But what are unjust and unreasonable discriminations? No rule can be formulated to apply to every case that may arise. It may, however, be said that it is only where the discrimination enures to the undue advantage of one man in consequence of some injustice inflicted on another, that the law intervenes

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for the protection of the latter. Harmless discrimination may be indulged in."

A similar distinction is made in another case cited by plaintiff, wherein the Court said: "The common and equal right is to reasonable service for a reasonable compensation. Neither the service nor the price is necessarily unreasonable, because it is unequal. The question is not merely whether the service or price is absolutely unequal, in the narrowest sense, but also whether the inequality is unreasonable and injurious." * * * "This question may be made unnecessarily difficult by an indefiniteness, confusion and obscurity of ideas that may arise when the public duty of a common carrier and the correlative common right to his reasonable service for a reasonable price are not clearly and broadly distinguished from a matter of private charity. If A receives, as a charity, transportation service without price, or for less than a reasonable price, from B, who is a common carrier, A does not receive it as his enjoyment of the common right; B does not give it as a performance of his public duty; C, who is required to pay a reasonable price for a reasonable service, is not injured, and the public, supplied with reasonable facilities and accommodations on reasonable terms, cannot complain that B is violating his public duty. There is in such a case no discrimination, reasonable or unreasonable, in that reasonable service for a reasonable price [is given], which is the common right." *McDuffee vs. Railroad*, 52 451, 452. See also 47 Pa. St. 340; *Shipper vs. Pa. R. R. Co., Railway and Corporation Law Journal*, Vol. 1, No. 15, p. 339; *Schwarz et al. vs. Baltimore Gas Light Company*, *Wood's Railway Law*, p. 565, Sec. 197.

So in this case, if we subject the act of the city to the test of the general law on the subject of discriminations, as though she herself owned and operated the road, we find that plaintiff and all other persons have a reasonable service at an avowedly reasonable price, and that the difference made in favor of actual residents above Napoleon avenue is simply an act of liberality, resting on a sense of justice and fair play, to a class of people who are all treated alike in the matter of that service, and who would, in default of that exception, be placed at a great disadvantage from all other residents of the city. Hence, we conclude that under those circumstances the public cannot complain, and that plaintiff's action cannot be maintained.

Judgment affirmed.

Kearns, Curator, vs. Collins.

No. 10,157.

GEORGE W. KEARNS, CURATOR, vs. MRS. A. S. COLLINS.

A tax sale under an assessment for taxes of 1868, in the name of a deceased person to whom the property did not belong at the time, is without effect, and no judgment subsequently rendered on motion can impart any validity to such sale. The law in force then required the assessment to be made in the name of the actual owner.

Prescription by which tax sales may be validated, or which debar from action to avoid such sales, does not run against incapacitated persons.

A PPEAL from the Civil District Court for the Parish of Orleans,
Houston, J.

James B. Guthrie for Plaintiff and Appellee :

- a) A sale by a constable, in parish of Jefferson, under a writ of *f. fa.* over 90 days old, not returned within 30 days from its date, is null and void. R. S., Sec. 635; Graff vs. Moylan, 28 Ann. 75; Jacobshagen vs. Moylan, 26 Ann. 735.
- (b) Sections 8 and 9 of Act 57 of 1867, providing summary proceedings for the collection of taxes, not being expressed in the title, are unconstitutional. Art. 118, Const. 1864; Succession of Irwin, 33 Ann. 69.
- (c) Putting down the name of a fictitious person on the assessment roll, obtaining judgment against another non-entity (one who has been dead for thirteen years), is not an assessment of property, and a sale under such a judgment of property of an interdicted person, whose title has been duly registered for fourteen years previous to said proceedings, is an absolute nullity, which neither prescription or motion can cure. Hickman vs. Dawson, 35 Ann. 1087; Lague vs. Boagni, 32 Ann. 912; LeBlanc vs. Blodgett, 34 Ann. 106; Guidry vs. Broussard, 32 Ann. 925; Stafford vs. Twitcomb, 33 Ann. 536; 28 Ann. 670, Dissenting Opinion, Justice Wiley. As to prescription not running against an interdict. Barrow vs. Wilson, 39 Ann. 409; Same Case, 38 Ann. 209-216; C. C. 3522 and 3554; Verlet vs. Berlinger, 6 Ann. 111. As to motion and its effects. Fix vs. Dierker, 30 Ann. 175; Roberts vs. Zanaler, 34 Ann. 205; Woolfalk vs. Fombene, 15 Ann. 15; Dodman vs. Barrow, 10 Ann. 193; Kent vs. Leonard, 38 Ann. 809.
- (d) One evicted from property has only a personal action and not a real action for reimbursement of taxes actually paid out by him. 2 La. 92; and has no right of action for taxes paid by former occupants between whom and said evicted party there is no privity.

George L. Bright for Defendant and Appellant.

No syllabus; but cited the following authorities: Acts of 1867, Sec. 9, p. 115; Carter, Congreve et al. vs. City of New Orleans, 33 Ann. 816; Brown vs. Learned, 38 Ann. 870; City of New Orleans vs. Ferguson, 28 Ann. 240; City vs. Stewart, 28 Ann. 180; Lewell vs. Watson, 31 Ann. 591; Roberts vs. Zanaler, 34 Ann. 208; R. S., Sec. 2376, 2379; Act 105 of 1874, Sec. 5; Art. C. C. 3543; McMullen vs. Anderson, 95 U. S. Rep. 40.

The opinion of the Court was delivered by
BERMUDEZ, C. J. This is a petitory action.

The plaintiff, as curator of the widow of Joseph Allen, interdicted in January, 1867, claims the ownership of certain real estate, once situated in Jefferson City and now in New Orleans. He alleges that it was donated to her by her husband in 1856, anterior to their marriage,

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Kearns, Curator, vs. Collins.

the act being recorded the next day. He avers that the property has never been alienated by her, and is in possession of the defendant, who pretends to be the owner of it.

The defence is that the defendant purchased the property in 1884, at the probate sale of her husband's estate, and that he had a valid title to it, for having acquired it, in 1872, from Caulkins, who had bought it at a tax sale made in May, 1870.

In support of her title, the defendant urges that the sale was made in the manner directed by the charter of Jefferson City, to enforce the payment of taxes; that the sale was validated by Act No. 101 of 1873; that the assessment made in the name of Ann May was legal; that, if it was informal, the irregularity was cured by a monition duly homologated; that the action is barred by the prescription of ten, five, three and two years; that should the plaintiff recover, the defendant is entitled to the reimbursement of taxes paid since on the property.

From a judgment in favor of plaintiff and allowing a fraction only of the taxes claimed, defendant appeals.

The record shows that Joseph Allen, who had purchased the property from Kohn, in 1849, donated it to Ann Hewitt May, in 1851, previous to their marriage, under the condition that, should either die without issue of their marriage, the survivor would own the property. The act of donation was properly and duly recorded in the conveyance office, of the parish of Jefferson, shortly after its execution, and the parties married.

In May, 1855, Ann H. May, wife of Joseph Allen, departed this life. Her succession was opened, and on proof that she had died leaving no issue of marriage (with her husband), he was recognized as the owner of the property and was put in possession.

In November, 1856, Joseph Allen, being about to marry Widow Charzotte, born Clarie, donated to her the property in dispute with the stipulation that, were she to die without issue of their marriage, the property would revert to him. The act of donation was recorded in the conveyance book of the recorder's office, of Jefferson parish, in November, 1856, and the parties married.

In May, 1860, Joseph Allen died without issue. In January, 1867, his widow was interdicted and placed in an insane institution, and the plaintiff was appointed her curator.

It appears that the lot in question was not assessed in the name of Ann H. May until a year after her death, and the assessment for the taxes of 1868 was made in the name of *Ann May*, and was changed only after the sale to Collins.

The only matters to be considered, in order to determine the question of ownership, are:

1. Whether the assessment of the property for the taxes of 1868, in the name of Ann May, was such as could justify a divestiture by a sale to pay those taxes;

2. Whether defects in the assessment, or proceedings for the sale, were cured by prescription or monition; and,

3. Whether the action to recover is barred by time.

It is proper to recall that Ann H. May, afterwards Mrs. Allen, died in 1855; that the property then reverted to her husband and donor; that in 1856 title to it was made by him to Widow Charzotte, who next became his wife; that the act of donation was duly and seasonably recorded; that in 1867, the second Mrs. Allen, then a widow, was interdicted, and that when the property was assessed in 1868, in the name of May, the latter was dead and had no title to it; that the title of Widow Charzotte, to which it then belonged, had been on the public records, or archives, for some thirteen years.

The law in force at the time of the assessment, it is not denied, required real estate to be assessed in the *name* of its owner.

In a number of cases, tax sales have been annulled when the property had not been thus assessed, and had been sold to pay the taxes levied on it. This was done on the principle, well recognized and indisputable, that the validity of tax sales is to be tested under the laws in force at the time.

In Stafford's case, 33 Ann. 526, the Court held that when an assessment was void, the sale was a nullity.

This doctrine was followed in other cases reported in 32 Ann. 912, 925; 34 Ann. 108; 38 Ann. 400; 26 Ann. 730; 35 Ann. 1086; 30 Ann. 175; 28 Ann. 538. See authorities in opinions.

The ruling in Kent vs. Brown, 38 Ann. 802, cannot be invoked successfully. There exists no parity between the facts involved in the two cases, and the propositions of law are dissimilar. The decision stands on the exceptional circumstances of the case.

It is, therefore, apparent, as Ann H. May died in 1855 and her title then passed to Allen; as the title to the property made in 1856 by the latter in favor of Widow Charzotte was on the public records from 1856 and upwards, the assessment in 1868, in the name of Ann May, is illegal, and the sale of the property is an absolute nullity.

The various prescriptions pleaded cannot avail, as, previous to and

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at the time of the sale, Widow Charzotte, next Widow Allen, was interdicted, and that such prescriptions do not run against incapacitated persons. *Barrow vs. Wilson*, 38 Ann. 209; *Ib.* 39 Ann. 409.

The homologation of the monition obtained with a view to cure defects in the tax sale proceedings, cannot avail the defendant where the irregularity is radical.

In *Fix vs. Dierker*, 30 Ann. 175, it was held that a tax sale under an assessment, in the name of a *deceased* person, to whom the property did not belong actually, is without effect, and no judgment subsequently rendered on monition, can impart any validity to such sale.

The Court adhered to the rule that, where there is no assessment or judgment against the true owner, there can be no valid divestiture. The defect is fundamental and is not curable by monition.

See, also, *Woolfolk*, 15 Ann. 15; *Roberts*, 34 Ann. 205; *Dodman*, 10 Ann. 193.

Neither can defendant find relief by invoking the late ruling of this Court in the matter of Orloff Lake praying, etc., for the plain reason, that the pretended sale, in the instant case, was made in 1870, and the law on which the ruling was based was passed in 1884, and refers only to sales made under its provisions.

Under the circumstances of this case, we therefore hold that the title made to Collins and his vendor is a nullity, and that the property claimed belongs to the interdicted, Widow Allen, represented herein by Kerns, her curator.

The only matter remaining for consideration is the claim for reimbursement for taxes which the defendant claims to have paid on the property.

There is no evidence to show that *she* paid *all* the taxes. The certainty, as the bills show on their faces, is that they were paid by her husband or his estate. Nothing establishes that she represents either of these, and that payment to her would discharge the debt.

The District Court, however, condemned the plaintiff to pay \$77 52 for city and State taxes, proved to have been paid by the defendant. The allowance is proper.

Judgment affirmed.

Rehearing refused.

Larquié vs. His Wife.

No. 10,094.

HENRI LARQUIÉ vs. HIS WIFE.

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A party who resides in this State with the intention of fixing here his domicile for an indefinite period of time and engages in active business pursuits for a number of years acquires a domicile in the place in which he has thus lived, which becomes the conjugal domicile, if, in the meantime, he contracts marriage even in a foreign country with a wife, whom he brings to his residence and who lives here with him a number of years. The wife who visits and sojourns in her native country and refuses to return to the domicile thus established is amenable to the courts of this State in an action for separation from bed and board by the husband for her alleged abandonment of the conjugal domicile.

A PPEAL from the Civil District Court, Parish of Orleans.
Voorkies, J.

Frank D. Chretien and Blanc & Butler for Plaintiff and Appellant.

Harry H. Hall and J. N. Wolfson for Defendant and Appellee.

The opinion of the Court was delivered by

POCHÉ, J. Resisting her husband's demand for a judgment of separation from bed and board predicated on her alleged abandonment of the conjugal domicile, the defendant urges the following reasons substantially:

1. That the conjugal domicile is not in Louisiana, but in France, where the marriage was contracted in June, 1872, and where the spouses resided for several years, upon the distinct promise of the plaintiff to continue to reside in that country.

2. That when she left the temporary abode in New Orleans, where the couple had resided from 1876 to 1881, it was with the permission and at the request of plaintiff, who sent her to France for reasons of her failing and impaired health.

3. That, under her present condition of health, in connection with climatic influences prevailing in New Orleans, her life would be endangered by a return to the city.

Plaintiff appeals from a judgment which rejected his demand.

The testimony is very conflicting, but the preponderance of the evidence establishes to the entire satisfaction of the judicial mind the following facts:

Plaintiff, who is a native and is yet a citizen of France, came to New Orleans in the year 1846, since which time he has been continuously engaged in active business pursuits of various kinds in this city, where he has continuously resided, save and except two years, during

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which he lived in France, immediately preceding and following the date of his marriage.

In 1873 he returned to this country with his wife, with whom he lived here until 1875, when they, together, made a trip to France, whence they returned in 1876, bringing with them their first child, whom they had left in France in 1873. Their second child was born in this city, where the two spouses lived together, "keeping house," until 1881, when the defendant went to France, with the consent of her husband, and where she has since sojourned, notwithstanding reiterated requests and demands from him to return to their home in this city. To these demands she has persistently resisted, under various pretexts—that of ill health being the reason given to the husband and to the court.

During his long residence in this country plaintiff has, at divers times, been the lessee of a portion, and is now the lessee, of all of the public markets of the city of New Orleans, and since the year 1880 he has also filled the functions of president of a street railroad company in this city.

In his contract with the city, in authentic form, plaintiff represents himself and is dealt with as a resident of New Orleans; and the nature of the contract itself requires a personal attention and control which a resident alone can give. The same may be said of plaintiff's functions as president of a city railroad company. On the occasions of two recent trips which he made to France, one in 1882 and the other in 1884, it became necessary for him to obtain a leave of absence from the board of directors of the railroad company.

On both of those visits to his native country, but more particularly in 1884, plaintiff used every means within his power, including the assistance of other persons, to decide and induce his wife to return with him to his home in this city, but to no avail.

In the examination of the record due consideration has been given to testimony and other evidence showing that plaintiff has always had and manifested his intention and cherished the hope that if he succeeded in retrieving his almost lost fortune, which he had earned in this city, he would, in the remote and uncertain future, return to live and end his days in his mother country, on property which he purchased there in 1872.

But the proof is conclusive that on his return from France in 1873 he resumed his permanent residence, and established his fixed domicile for an indefinite time in this city, where he owns considerable property,

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and which thus became the conjugal domicile. Hence the jurisdiction of this case properly and legally belongs to the courts of this State. C. C. 38, 42, 43; Verret vs. Bouvillain, 33 Ann. 1305; Mullen vs. Hilton, 13 Ann. 1; Gravillon vs. Rickarts, 13 La. 297; Dugat vs. Markham, 2 La. 35; Chrétien vs. Chrétien 5 N. S. 61.

Respectful consideration has been given to the conclusions reached by a competent court in France, in a suit for separation instituted in that country against the plaintiff herein by his wife, and in which it was held that the conjugal domicile was in that country. But it is very clear that the French tribunal did not have before it the testimony which is contained in the record before this Court. But, at all events, the question presented here must be disposed of in accordance with our laws and our jurisprudence, under which it could never be held that plaintiff had not a fixed domicile in Louisiana at the time of bringing this suit; and hence that domicile must be held to be that of the wife also.

On the other points of contention the record shows that defendant did have the permission and consent of her husband to return to France in 1881, and that he then believed that the trip was necessary to her health. And there is testimony in the record to the effect that she has not yet entirely recovered her former robust health, and that in the opinion of her physician there, the climate of Louisiana would not have a beneficial influence on her peculiar ailment. But on that point the evidence in the record is overwhelming in support of the proposition that her health would not suffer by a return to this city, and, above all, that her condition of health, such as it may be, is not the reason of her refusal to come back to her husband's domicile.

She is entirely actuated by other reasons, which it is not necessary to mention, but which have no force in law, and which cannot justify her persistent refusal to return to the conjugal domicile. C. C. 120; Neal vs. Her Husband, 1 Ann. 315; Gahn vs. Darby, 36 Ann. 70.

In the latter case, Article 120 of the Civil Code was construed by this Court so as to require the wife to follow her husband to a new conjugal domicile which he proposed to establish and to which she had never been. *A fortiori* will the rule apply to a case in which it appears that the husband has resided over forty years in a place, to which he brought his wife fifteen years ago, and in which she lived with him at the conjugal domicile for seven years.

The record and the law governing the matter clearly lead to the

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conclusion that the case is with plaintiff, and that he is also entitled to the custody of the children born of the marriage.

All the formalities prescribed by Article 145 of the Civil Code having been complied with, the proper judgment to be rendered is one of separation from bed and board.

It is, therefore, ordered that the judgment appealed from be annulled, avoided and reversed; and it is now ordered that plaintiff do have and recover a judgment of separation from bed and board against his wife, the defendant herein, with the custody of the children born of their marriage, and for costs in both courts.

No. 10.165.

STATE OF LOUISIANA VS. JOHN WYMBERLY.

To constitute perjury, it is essential that the false swearing should have been committed with respect to some matter over which the Court had jurisdiction.

So where the alleged false oath was taken before a justice of the peace, and the oath administered by him in an examination by or before such justice in a prosecution for burglary, such false swearing could not be perjury, because for such a crime, and others punishable with death or imprisonment at hard labor, a justice of the peace in the country parishes is without jurisdiction to conduct such examination. This proceeding is exclusively committed by law to the district judge, and he cannot delegate his authority to a justice of the peace. Where the false swearing is not perjury, a charge of subornation of perjury cannot be based upon it.

A PPEAL from the Second Judicial District Court, Parish of Bien ville. *Drew, J.*

M. J. Cunningham, Attorney General, for the State, Appellant.

Patterson & Dorman for Defendant and Appellee.

The opinion of the Court was delivered by

TODD, J. The defendant, Wymberly, charged, by information received, with subornation of perjury, was tried and convicted.

He presented a motion in arrest of judgment, which was sustained, and the State, through the District Attorney, appeals.

The material facts relating to this prosecution are these:

Wymberly, the defendant, and one Mag Hatchet were arrested on the charge of burglary, and taken before one Sam Barksdale, justice of the peace of said parish.

The justice proceeded to take and reduce to writing the testimony of witnesses appearing before him in relation to the commission of the crime charged.

Among the witnesses so appearing and testifying was one John

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Henderson, who is charged to have given testimony on a material point in favor of Wymberly, and that in doing so, to have committed willful perjury by the inducement and procurement of Wymberly, and that Wymberly was thereby guilty of subornation of perjury, which is the charge contained in the information before us, and on which he was tried and convicted, as above stated.

The motion in arrest, and under which sentence was arrested, as above stated, was, substantially, on the ground :

That the justice of the peace who administered the oath to the witness, Henderson, charged to have sworn falsely, and before whom the investigation was had touching the charge of burglary preferred, was without jurisdiction over the subject matter of the inquiry before him, and, consequently, without legal authority or capacity to administer the oath ; and that no prosecution for perjury or subornation of perjury could be grounded on an oath thus administered by incompetent authority and touching a matter over which the court or the judge or justice therein presiding had no jurisdiction *ratione materia*.

Art. 126 of the State Constitution provides :

"They (Justices of the peace) shall have criminal jurisdiction as committing magistrates, and shall have power to bail or discharge in cases not capital or necessarily punishable at hard labor."

Section 1010, R. S., makes it the duty of a justice of the peace, where an accusation is made on the oath of a credible witness to cause the accused to be arrested.

When arrested, if the offence charged be one that may subject the accused to capital punishment or imprisonment at hard labor, he must "be brought before the district judge of the parish in which the offence may be charged to have been committed, and be proceeded on and examined according to law."

If not so punishable, then it is the duty of the justice "to examine, on oath, the witnesses, and reduce their depositions to writing."

Section 2058, R. S., contains similar provisions.

It is plainly inferable, from these constitutional and statutory provisions, that the power of a justice of the peace to hold and conduct preliminary examinations in criminal prosecutions, is limited to cases where the offence charged is not capital and not punishable with imprisonment at hard labor. Proceedings before such officers which relate to such crime or crimes so punishable, and testimony taken and oaths administered, must be viewed as *coram non judice*, and, consequently, without legal effect or significance.

It is, however, urged by counsel for the State that this examination before the justice in the prosecution for burglary, referred to, was authorized by Act No. 45 of 1886.

This act is entitled, an act "to re-enact Sections 1015, 2063 and 3951 of the Revised Statutes, to provide for the appointment of a property clerk," etc.

Section 1015, R. S., provides, in substance, that when a party charged with an offence is brought before a justice of the peace, that this officer shall take the depositions of the material witnesses on the part of the State, and also take the recognizances or bonds of the witnesses for their appearance before the district court. If this section could be construed as relating to or warranting preliminary examinations before justices of the peace, it must be construed in connection with the article of the Constitution and the sections, R. S., cited above, limiting their authority, in such proceeding, to cases not capital and not punishable by hard labor.

Section 2063, R. S., is but a repetition of Section 1015, with the further provision requiring the justice to deliver to the clerk of the court any stolen property or weapons taken from the parties accused, or forged bills, or notes, etc., produced on their trial.

Section 3951 is but a reproduction *ipsissimis verbis* of Section 2063, R. S.

Act 45 of 1886 is merely a re-enactment of the three sections above enumerated and a consolidation of their several provisions into one act, with no enlargement whatever of the powers of the justices or committing magistrates over those expressed in the said sections.

In other words, the act gives no sanction whatever to the counsel's contention, that by its terms, the restrictions imposed by the statutes first above cited in the jurisdiction or power of justices of the peace, touching preliminary examinations, had been removed; and that such officers never had authority to extend such examinations to all and the gravest offences.

Finally, it is contended that the examination in proceeding before the justice of the peace, in which this perjury and subornation of perjury were alleged to have been committed, was conducted by the order or direction of the district judge, and was thus legalized.

It is hardly necessary to say that if the law did not vest the justice of the peace with power to conduct such preliminary examinations, the judge could not confer no such warrant. Besides, the law imposed this duty, as relates to the investigation and prosecution of felonies or the graver offences, on the judge himself *exclusively*, and

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authority to perform such duty was denied or withheld from inferior judicial officers, such as justices of the peace, in the country parishes. This shows that the order or direction of the judge in this instance was not only without authority, but in contravention of law.

Holding these views, we think the trial judge was right in arresting the judgment in the prosecution under review, and the judgment appealed from is, therefore, affirmed.

 No. 10,181.

STATE OF LOUISIANA VS. LIVERPOOL, LONDON AND GLOBE INSURANCE COMPANY.

The very object of Art. 206 of the Constitution was to remove license taxation from the operation of Art. 203 requiring all taxation to be equal and uniform, and to authorize require license-taxation to be graduated.

The term "graduate" is a word of elastic meaning involving infinite variety in the methods and standard of graduation which may be adopted.

The Constitution simply requiring the General Assembly to *graduate* license taxes without indicating any particular method or standard of graduation, has devolved on the Assembly the function of determining what method shall be adopted.

▲ law which divides insurance companies into several classes according to the amount of premiums received, and imposes on each class a different license-tax, greater upon those receiving a larger amount of premiums than on those receiving less, complies with the requirement of graduation.

The charge that smaller companies pay a larger tax in proportion to their premiums than the larger companies, may impugn the justice, but not the constitutionality of the law, the constitution not declaring that the graduation shall be in exact proportion to the business done.

▲ foreign corporation is not *required* by the Constitution to be licensed by a different mode from that provided for home corporations. The Constitution is not imperative, but simply permissive of such mode. Such corporation cannot complain that the license claimed is based on the system adopted for home organizations.

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

John McEnery and Walter B. Sommerville for State, Appellee.

Sec. 7 of Act. No. 106 of 1886 is graduated in accordance with Art. 206 of the Constitution, and the license taxes imposed on all companies and persons falling within any given class are equal and uniform. *State vs. Chapman & Generally*, 35 Ann. 76; *State vs. O'Hara*, 36 Ann. 94; *State vs. Schonhausen*, 35 Ann. 42.

E. W. Huntington and Horace L. Dufour for Defendant and Appellant.

The license taxation on insurance companies fixed in Sec. 7, Act. No. 101, 1886, is violative of Articles 203 and 206, Constitution of Louisiana 1879.

In interpreting a law or an article of a constitution, regard must be had to its object, and

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the mischief it was intended to remedy. 5 Ann. 516; C. C. 18; 6 Ann. 386; 9 Ann. 165; 12 Ann. 777, 154; 11 Ann. 194; 12 Ann. 699.

Reference to the history of a law or article of a constitution can be had to ascertain its meaning. 11 Ann. 439; 16 L. 268; 5 N. S. 140; 5 Ann. 516.

Prior to the Constitution of 1879 the Legislature constantly sought to proportion and graduate license taxation according to the quantity of business done, and by other equitable standards and proportionate apportionment, but were prevented by the courts declaring such graduations inadmissible under the then existing constitutions. 23 Ann. 449, 464; 24 Ann. 112; 26 Ann. 141; 28 Ann. 102. To obviate this difficulty Art. 206 of the present Constitution provided for a "graduation."

Where a new system of law is introduced in the State, the terms used in it are to be interpreted by the jurisprudence from which it is taken. 16 L. 394; 30 Grattan, 477.

The system of a graduated license tax is new in this State and is taken from other states, where it has long prevailed, and to which we must look for the meaning of the word "graduation"—which means a proportionate scaling of the license tax on a basis "which is reasonably fair and just." 1 Pacific Rep. 204 (Kansas); there must be a "rational" basis "and the apportionment of taxes accordingly." Cooley on Tax. Note to p. 139; 10 Pacific Rep. (Cal.) 113; 31 Iowa, 106. In "graduation" there must be "an intended approximation to equality, and if the assignment is fair and judicious, or nearly attains it, as is perhaps practicable in a license law." 23 Grattan, 473; 26 Ann. 93.

The opinion of the Court was delivered by

FENNER, J. The defendant resists the claim of the State to the license-tax due under the Act No. 101 of 1886, on the ground that said act is unconstitutional, because the license taxes thereby imposed are not equal and uniform and because they are not graduated in the manner directed and required by the Constitution of 1879.

Art. 203 of the Constitution provides that "taxation shall be equal and uniform," etc. Art. 206 provides: "The General Assembly may levy a license tax and, in such case, shall graduate the amount of such tax to be collected from the persons pursuing the several trades, professions and callings."

1. It is very certain that the license taxes imposed by the Act of 1886 are not "equal and uniform;" if they were, they would clearly be unconstitutional.

The meaning of the requirement of equality and uniformity as applied to license taxation was settled by numerous decisions under the Constitution of 1868, from one of which we quote: "The Constitution (of 1868) requires that a license tax as well as a tax on property shall be equal and uniform. To be equal and uniform the tax imposed must be the same on all who engage in the particular profession or calling taxed, without reference to the abilities, fortunes or successes of these engaging therein." City of N. O. vs. Home Ins. Co., 23 Ann. 449; State vs. Endom, 23 Ann. 663; Parish vs. Gurth, 26 Ann. 140; Cullman vs. City, 28 Ann. 102.

The utterance above quoted was made in a case involving a license-tax upon insurance companies very similar to that contained in the act of 1886, the companies being divided into classes according to the amount of premiums received and a different rate of tax being required from each class.

This and the other kindred decisions above cited furnished the controlling motive which prompted the adoption of Art. 206 of the present constitution, by which license taxation is exempted from the requirement of equality and uniformity, and is not only authorized but required to be graduated.

2. The next defense is that the license taxes imposed by the act of 1886 are not "graduated in the manner directed and required by the Constitution of 1879."

The natural inquiry arises, what manner of graduation is required and directed by the Constitution? There is no provision or direction whatever. The simple requirement is that "the General Assembly shall graduate the amount of such tax to be collected," etc.

The word "graduate," philologically considered, is one of elastic import having various meanings. Of the definitions given in the dictionaries, the one most applicable is the following: "To regulate by degrees; to proportion; to adjust; as to graduate punishments." Worcester's Dic.

The standards and methods of regulation, proportion and adjustment are susceptible of infinite variation. If the framers of the Constitution had seen fit to require some particular method or standard, they might have indicated and defined it; but they have not done so. Who then is to determine what method of graduation shall be adopted? The Constitution has expressly and distinctly confided this function to the General Assembly.

The General Assembly has exercised it in the law before us. It has divided the companies and persons pursuing the business of insurance into several classes, according to the amount of premiums collected. It has levied upon each class a different license tax, greater upon those receiving a larger amount of premiums than upon those receiving a less.

This is certainly a graduation of the tax—a proportioning, regulation and adjustment of the tax between the different classes according to the amount of business done. The complaint is that the smaller companies, though paying a substantially less tax than the larger ones, pay a larger amount in proportion to the business done. This may be

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an objection to the propriety and justice of the law, but unless defendant can point out some provision of the Constitution requiring that the tax shall be graduated in exact proportion to the amount of business done, it is of no avail as an attack upon the constitutionality of the law. The Constitution has laid down no such rule, and it is not in our power to do so.

Such a rule would prevent all classification whatever, and would convert the license taxation into a simple income tax which was certainly never intended.

The method of graduation here presented was the one attempted by the General Assembly under the Constitution of 1868, the judicial condemnation of which was the evil intended to be remedied by Art. 206 of the present Constitution. It has been one of the methods pursued in all the license laws adopted under the latter Constitution, and everything indicates that it was one contemplated by that instrument.

We have had occasion heretofore to consider the nature of the power conferred on the General Assembly by Article 206 and have reached conclusions analogous to those now announced. *State vs. Chapman*, 35 Ann. 76; *State vs. O'Hara*, 36 Ann. 94; *State vs. Schonshausen*, 37 Ann. 42; *State vs. Marrero*, 38 Ann. 397.

The case is one eminently requiring the application of the principle recently announced by us: "That the judiciary, recognizing the right and duty of the Legislature to construe and determine primarily its own power under the Constitution, will never overrule that determination unless clearly convinced of such radical inconsistency between the law and the Constitution, that the two cannot be reconciled." *Planting Company vs. Tax-collector*, 39 Ann. 465.

Judgment affirmed.

ON APPLICATION FOR REHEARING.

BERMUDEZ, C. J. Counsel for the company now rely for the first time on Art. 217 of the Constitution to show that the Constitution requires equality and uniformity in license taxation. Although made late, it will be considered.

The article is not imperative, but only permissive. It does not *require* that corporations, companies or associations organized or domiciled out of this State and doing business therein, be licensed by a mode different from that provided for home corporations or companies.

It simply provides that such organizations *may* be licensed, and

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when they are licensed, the different modes of license shall be uniform upon a graduated system, as to all such corporations, companies or associations that transact the same kind of business.

There is nothing to show that the license demanded, is claimed under a mode different from that established for home corporations or companies; on the contrary, it appears that the license is the same that would have been demanded from the defendant company, if it were a home corporation. This would suffice to shut out the defendant from all complaint, for it cannot pretend that, because it was not treated as a foreign organization, it is entitled to privileges, or favors, or protection which cannot be extended to home institutions.

Moreover, whatever has been said in the opinion touching the mode of license, when different, the uniformity and a graduated system, stands in refutation of the new proposition advanced.

Rehearing refused.

No. 10,105.

JOHN B. YATES VS. SOUTHWESTERN BRUSH ELECTIC LIGHT AND
POWER COMPANY.

This is an action for damages occasioned to a policeman, while on duty at the New Orleans National Bank, in this city, by an explosion of a part of the apparatus appertaining to its electrical installation.

It comes fairly within the principle of the code, that is to the effect that every one is "responsible not only for the damage occasioned by his own act, but for that which is caused by the things which he had in his custody" or control.

A PPEAL from the Civil District Court, Parish of Orleans.
Tissot, J.

Braughn, Buck, Dinkelspiel & Hart for Plaintiff and Appellee:

1. Where plaintiff has proved the allegations of his petition, and shown a want of skill, incapacity or negligence on the part of defendant, and has proven his damages, he is entitled to recover.
2. "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." C. C., Art. 2315.
"Every person is responsible for the damages he causes, not merely by his act, but by his negligence, his imprudence, or his want of skill." C. C., Art. 2316.
3. In estimating damages the court must be guided by the evidence in the record. Where the verdict of the jury is not manifestly excessive, and where the court can feel no certainty that any modification thereof would come nearer to exact retribution, the Supreme Court is not justified in disturbing it. 37 Ann. 92.
In such case the verdict of the jury will not be disturbed on appeal, unless manifestly erroneous and glaringly unjust. 37 Ann. 226.
4. Courts will not look with much respect or sincerity or good faith on litigants when they

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set up a frivolous defense. Such tactics operate against them in case of conflict of testimony. 23 Ann. 674.

5. When the testimony of a witness is contradictory, the one swearing affirmatively and giving detailed circumstances will preponderate. 26 Ann. 678.
6. The unimpeached testimony of a disinterested witness must be weighed, and cannot be disregarded by the court. 28 Ann. 682; 27 Ann. 308.

E. M. Hudson for defendant and Appellant:

1. Under the general issue, plaintiff must prove all the facts necessary to a recovery. *Parrot vs. Edwards*, 19 La. 369. The general denial is leveled against, not only the simple averment of facts, but the compound statement of facts, with legal deductions therefrom. *Durham vs. Williams*, 32 Ann. 967.
2. Under the general issue, defendant may show any fact tending to prove that he is not indebted to plaintiff, as alleged. *Bonnable vs. Bouigny*, 1 R. 292.
3. The general issue reduces the controversy to the question of the truth or falsity of plaintiff's allegations, and the legal effect of the facts when proved. *Wells vs. St. Dizier*, 9 Ann. 119.
4. The rule that "parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid instrument," applies:—
 - (a) Only to contracts which are in writing. 1 Greenleaf on Evidence, § 275.
 - (b) Only in suits between the parties to the instrument.
 And it cannot effect third parties, who, if it were otherwise, might be prejudiced by things recited in writings, contrary to the truth, through the ignorance, carelessness or fraud of other parties; and who ought not, therefore, to be precluded from proving the truth, however contradictory to the statements of others. 1 Greenleaf, §§ 279, 211, 171 and 204; 2 Starkie on Evidence, 575.
5. Parol evidence is admissible to show error in *descriptio loci et descriptio personæ* stated in a receipt. 15 L. 311; 9 Ann. 29.

A receipt for money is not conclusive between the parties, but is open to explanation by parol. 5 Ann. 408; 1 Greenleaf, § 305.
6. In an action growing out of quasi-offenses, he alone is responsible, in damages, by whose fault the accident or injury was caused. C. C., Art. 3316.
7. A party alleging want of skill or diligence must prove the same. No damage will be allowed on a simple charge of negligence, imprudence or want of skill, unless the same be conclusively established. *Kirk vs. Folsom*, 23 Ann. 584; *Rawson vs. Labranche*, 16 Ann. 121.
8. The plaintiff must make his case certain, and the burden of proof is upon him to show that the alleged injury was the result of the negligence of the defendant. *Stevenson vs. R. R. Co.*, 35 Ann. 499 *et seq.*; 35 Ann. 697, and 36 Ann. 24, both citing *Stevenson vs. R. R. Co.*, and re-affirming this doctrine.

The opinion of the Court was delivered by

WATKINS, J. The plaintiff seeks to recover \$3000 damages from the defendant company, on account of certain injuries he received while in the performance of duty in the building and property of the New Orleans National Bank, situated corner of Camp and Common streets, in the city of New Orleans—he being a member of Boylan & Farrell's police force at the time. The averments of his petition are, that the accident of which he complains took place on the morning of the 26th of February, 1887, at the hour of 6 o'clock a. m., and that it was

occasioned by the explosion of a metal pipe, through which an electric wire passed conveying electricity into the building for the purposes of incandescent lighting, and by the force of the explosion fragments of the pipe were driven violently against his head, just behind the right ear, whereby he was felled to the floor, stunned and senseless for a time, and from which he received serious and permanent injury.

The defendant's answer was a general denial. The case was tried by a jury, who found for the plaintiff \$2500, and the defendant has appealed.

I.

From the record we have gleaned the following facts in regard to the manner in which the accident occurred, the causes which superinduced it, and the injuries the plaintiff sustained by it.

It appears that on the morning in question the plaintiff went on duty at the bank at 5 A. M., and about an hour afterwards his attention was arrested by an electrical illumination which appeared over the door which opens into the president's room, and which is situated on the Camp street side of the building, facing Common street. He was standing about midway of the floor and between this room and the desk of the paying teller. A moment afterwards a blaze was discovered in the wood work over the desk of the paying teller, which he hastened to extinguish, and while thus engaged the brass pipe, through which the electric wire connected with the electro lear, exploded, and a blow was inflicted on his head and one on his back, which was turned towards the desk.

The shock was attended with a sound like that of the firing of a pistol, and the illumination it produced had the appearance of rockets or fireworks, and it continued, at intervals, for fifteen or twenty seconds.

The chandelier in the paying teller's apartment, into which the electric wire was introduced, was, at the time of the explosion, about twelve inches from his head.

This wire was insulated and passed through a metal pipe, and it was exploded, and the pipe also, by means of an usual exertion of electric force.

This was occasioned by a connection that was formed outside of the bank, on some part of the pole-line, with a wire carrying a higher tension of electricity than that which fed the incandescent lamps within the bank—that is to say, there was a contact on the outside of the bank of the wire which supplied the incandescent light inside with a wire carrying an arc current of high tension outside. The

effect of this contact was to pass the arc current into the bank, and, this current being beyond its capacity, an electrical explosion was produced, and the heat fused the metal and bursted the pipe.

In every electrical installation there is, necessarily, a safety fuse or safety catch, which is a mechanical contrivance that interpolates into the line of electric conductors a small piece of lead wire, the effect of which is that when an abnormal amount of electricity flows over the wire of the circuit it becomes melted by the excessive heat engendered and the current is broken.

These devices are intended to secure additional safety to persons using incandescent lights.

The one over the desk of the paying teller had, in this instance, lost its cover and its internal part was charred and defaced. The metal was melted and the wood work burned. It had operated, but not in the right way. There were evidences of burning on the electro lear as well as the fuse-catch.

There is no reasonable doubt of the fact that the proximate cause of the accident was the insufficiency of fuse-catches, either in number or capacity, to break the circuit and cut off the flow of electricity from an arc wire on the outside of the bank.

The brass tube containing the insulated wire was of about one-twentieth of an inch in thickness and one-fourth of an inch in diameter, and the fragments of it which inflicted the wound on the plaintiff's head were about two and one-half inches in length. Their edges were jagged and rough, and the metal was tarnished and discolored.

The tension of an arc current of electricity passing through a tube of such dimensions was quite sufficient to have exploded it and send the fragments against the plaintiff's head with sufficient violence to have produced the injuries he received.

The immediate effect of an arc current of the voltoge this one appeared to have, when exercised upon an individual, would be that of a heavy blow, and might cause, at least, temporary insensibility.

From the blow inflicted there was a knot raised on plaintiff's head, which is described by one witness as being of the size of a hen's egg. He was stunned and felled to the floor and rendered insensible for a time. He became quite sick from the effects of it, and vomited considerably. He became, on that account, unfitted for duty, his hearing in his right ear being seriously impaired.

Since the happening of the accident, attacks, similar to those described, have occurred frequently, though at irregular intervals, and last three or four hours at a time; and the plaintiff states that he

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experiences from them a great pressure on the right side of his head, above and behind his right ear, coupled with intense pain and dizziness.

One of his medical attendants states that, upon making an examination of the plaintiff's ear, he discovered *tinnitus*—i. e., a buzzing or humming in the ear—and the ear-drum congested, which was likely to produce inflammation of the ear-drum and impair the hearing.

Having heard the plaintiff's testimony, he gave it as his professional opinion that, while the plaintiff may be comparatively free from trouble at times, his affliction will continue during life time.

Since the accident the plaintiff has lost considerably in flesh, and has not been able to perform much work; and, indeed, it was stated by his counsel in argument, and not disavowed by counsel of the defendant company, that on account of his being unable to perform satisfactory service he had been discharged from employment at the bank.

At the date of this occurrence he was about fifty-two years of age, but strong, athletic and in perfect health. He is and has always been a laboring man. He has resided in this city ever since 1873, and has been regarded as faithful and efficient in the performance of any service assigned to him. He has a family dependent on him for support.

At the time of the occurrence he was employed at a stated salary of \$45 per month—i. e., \$540 *per annum*.

Manifestly this accident, and consequent injury to the plaintiff, was caused by the failure of the party establishing the electric installation in the bank to provide a means, so essential to the safety of those using electric lights, as the proper fuse-catches.

The happening of such an accident as the one under consideration may frequently occur in a large city like New Orleans, lighted externally and internally by electricity, which is generated by machines of different size, and the currents of which differs greatly in tension.

Indeed, the difference in the polarity of the metals brought in contact would naturally produce combustion and explosion, at the great risk of the population and hazard of property. To pass these differing currents of electricity from the generating machines to the various customers on the circuit and to the lamps on the streets a number of wires are employed, and they are strung on posts; and it is the plain duty of the persons exercising so dangerous a franchise to have especial care in their adjustment and installation, that their patrons,

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their servants and agents be protected from loss and danger. Such care was not taken in this instance.

The proof shows that there was provided, in the electric installation of the bank, what was termed a switch, the purpose of which is to enable a customer who is desirous of discontinuing the current at any time to cut it off. But it appears that this switch was placed on the wall at the head of the stair-case leading to the second floor. That in order to reach it one had to pass out of the bank into Common street, thence to the rear of the building, and thence up the stairs. There was no other way of reaching it. In addition, the proof shows that neither the plaintiff, the janitor or officers of the bank had been advised of its *existence*, much less of its use or locality.

II.

Under the general issue the defendant sought to prove that the defendant company did not establish the electric installation in the New Orleans National Bank, and was not responsible on that account; and that if any one was responsible, it was the Storage Battery Company, by whom the installation was erected in the bank. On this issue the testimony took a very wide range, and is, unfortunately, in conflict in many particulars. We can only cite a few of the leading features, as illustrating the view it has given us.

At the solicitation of certain persons, an officer of the defendant or Brush Company visited Rotterdam, Holland, in the summer of 1886 and purchased the right to sell and operate the De Khotinski patent for storing electricity of high tension, designed for distribution in low tension currents, for purposes of incandescent illumination.

In October of that year the Storage Battery Company was organized by the selection of a board of directors, and a secretary, treasurer, superintendent and president—all of whom, except the last, being like officers in the Brush Company.

The patentee furnished the accumulators for use as reservoirs in storing electricity.

The original contract and the company's charter are of this general tenor as to the objects of their organization.

The officers of the New Orleans National Bank claim to have made the contract for electric lighting with the Brush Company, and state that, after the accident, they gave notice to that company, and that they at once had it inspected and repaired without protest or objection.

The bills for the installation, as well as for lighting the bank during

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January and February, 1887, were made out on the blanks of the Brush Company and were presented for payment by their collector.

The installation was directed by their superintendent.

During those months the Brush Company operated incandescent lights from its own generating machine.

The Storage Battery Company kept neither ledger, journal or stock book, and no certificates of stock were ever issued. Its accounts were kept in the books of the Brush Company.

There is no receipt showing payment to it of any bill for incandescent lighting.

Its minutes show that, during its brief potential existence, no contract was consummated with any company for incandescent lighting, and it had no system of its own.

The notes for the rent of No. 18 Royal street, where the accumulators were stored, were executed by the Brush Company.

The cash book of the Storage Battery Company shows that its *total revenue* up to the 9th of May, 1887, the date of its suspension, was \$400 90. It shows that the total amount expended for material, antecedent to the accident, was \$450 65.

That nothing was expended for lamps or electricity, or the power to generate it.

There are sundry invoices in the name of the Storage Battery Company for goods purchased of the Westinghouse Electric Light Company, in March and April, 1887, aggregating \$10,000 in amount, while the cash book shows disbursements on that account of \$398, only.

The minute book of that company shows that the president was only authorized, on the 24th of February, 1887, to contract with the Westinghouse Company for the purpose of supplying it with their system of incandescent lighting, and that on the 7th of May, following, it had not been consummated.

But, on the contrary, it appears that the Brush Company was operating the Westinghouse system in *April and May*, 1887, and they did not purchase from the Storage Battery Company.

These and various other *indicia* satisfy us that the Storage Battery Company was merely an auxiliary of the defendant; that it never owned or used any system of incandescent electric illumination, and that its only object was to furnish storage for electricity of high tension for distribution in low tension currents, for the greater convenience of the Brush Company.

On this theory the manifold incongruities in the evidence can be

Gas Light Company vs. Hart.

harmonized and reconciled. The contention of the defendant, in this regard, cannot be sustained. The liability of the defendant is clearly made out.

III.

This action is brought under those provisions of the Code which declare that "every act whatever of man that causes damage to another, obliges him through whose *fault* it happened to repair it;" (R. C. C. 2315) and "every person is responsible for the damage he occasions, not merely by his *act*, but by his negligence, imprudence or want of *skill*;" (R. C. C. 2316) and "we are responsible not only for the damage occasioned by our *own* act, but for that which is caused by * * the *things* which we have in our custody." R. C. C. 2317.

These articles need no elaboration. The text is concise and of easy appreciation. The instant case comes fairly within the principle of Barnes vs. Buren, 38 Ann. 320, and How vs. New Orleans, 12 Ann. 481, in each of which a person passing a street of this city was awarded damages for injuries inflicted by a falling wall.

The plaintiff is evidently entitled to remuneration at the hands of the defendant, but we think the amount allowed is excessive and should be reduced to \$1250.

It is, therefore, ordered, adjudged and decreed that the verdict of the jury and the judgment of the court *a quo* be amended and reduced to \$1250, and that, as thus amended, same be affirmed, with cost of appeal taxed against the plaintiff and appellee.

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119 769

No. 10,153.

NEW ORLEANS GAS LIGHT COMPANY VS. MAURICE J. HART.

The right conferred on the Gas Light Company by its charter, to lay mains in the streets of New Orleans, does not imply that of erecting lamp-posts at the corner of such streets and of retaining them there indefinitely, when it does not furnish the city with gas, and there exists no contract between it and the city to that effect.

The right granted by the city to a party to erect towers or supports to carry wires and cable for electric purposes and to remove obstructions to such erections, cannot, be contradicted by one who does not claim a concurrent right.

The city of New Orleans, in the exercise of its police power, has the right of removing such obstructions for public convenience and benefit, and may delegate such power.

The police power is the right of a State, or of a State functionary, acting under delegated authority, to prescribe regulations for the good order, peace, protection, convenience and comfort of the community, without encroaching on the like power vested in Congress by the Federal Constitution. It is known when and where it begins, but not when and where it terminates. Under it, a man's property may be taken from him, his liberty may be shackled, his person and life imperilled, in cases of great public exigencies.

Gas Light Company vs. Hart.

A PPEAL from the Civil District Court for the Parish of Orleans.
Tissot, J.

Braughn, Buck, Dinkelspiel & Hart for Plaintiff and Appellant.

Farrar, Jonas & Kruttschnitt for Defendant and Appellee :

1. Upon the facts of this case plaintiff has shown no right whatever to maintain its lamp posts on the streets of the city of New Orleans.
2. A city may, in the exercise of its police powers, unquestionably make all necessary provisions with respect to the poles and wires of all telegraph, telephone, or electric light companies, within its limits, which the comfort and convenience of the community may require. *W. U. Telegraph Co. vs. Pendleton*, 122 U. S. 359; *Mut. U. Telegraph Co. vs. City of Chicago*, 16 Fed. Rep. 315.
3. Only a person having a right and interest to invoke the unconstitutionality of a law, as affecting himself, his property and his rights, can plead such unconstitutionality. *Moore vs. City of N. O.* 32 Ann. 746.

Blanc & Butler and *W. H. Rogers* on the same side.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The object of this suit is to enjoin perpetually the defendant from removing the lamp-posts erected by the plaintiff company in this city.

In defence, it is alleged that plaintiff has no right to oppose the removal when the same is unnecessary, and that the defendant has the right to take down the posts, under the authority delegated to him by the city in the exercise of the police power.

From a judgment dissolving the injunction issued *in limine* and rejecting the demand with recognition of the right to remove claimed by the defendant, the plaintiff prosecutes this appeal.

The contention in this controversy, arises under Section 5 of Ordinance No. 2145, C. S., adopted on March 8, 1887, by the City Council of New Orleans, providing for the erection and construction, upon the streets, of a system of towers, or supports, for the purpose of carrying all wires and cables, whether for telephone, electric light, telegraph, or other electrical objects, and authorizing the defendant to put up such towers, and to remove obstacles to such erection.

The ordinance provides that, whenever in the course of construction or erection of any of said towers, or supports, it shall be found necessary to remove or displace any post, pole, awning, sign, support, or other thing in or upon the public places, banquettes or streets, the said grantee, his heirs, agents, assigns and successors shall have the right

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to remove said post, pole, awning, sign, support or thing or things, and to occupy the place or places from which said removal shall have been made.

There is no dispute about the facts.

The plaintiff company has erected numerous lamp-posts at the corners of the sidewalks in the city, for the purpose of vending gas light to it and illuminating the streets and thoroughfares. The contracts for thus supplying this commodity have expired and others have been entered into for electric illumination.

Testimony establishes the danger to life and limb, in cases of fire, from contact with electric wires with the *apparatus* of the fire department, both when they approach buildings and when they fall upon the ground. It also shows the infinite number of electric wires strung on posts about the streets of the city for different objects, a fact so notorious that it may be judicially noticed.

The plaintiff shows no contract with the city to put up and *keep indefinitely* the lamp-posts which it has erected for the purpose of supplying light to the city, when none is furnished, for the use of the public. It alleges its charter from the State, granting it the right to lay gas mains about the streets; but it avers no authority from the State to put up and keep lamp-posts upon the public streets or corners when the community is not actually benefitted thereby.

It is a fact that the defendant claims the right, and was about to exercise it, of removing such lamp-posts erected by the plaintiff company, found at spots at which towers are proposed to be elevated.

We understand the company to contend that the defendant has no such right, *because* it has a contract whereby it is entitled to put up and keep the posts; *because* the right claimed by the defendant would arise from a prohibited monopoly; *because* the city herself could not remove the posts and even then delegate the power.

1. It is apparent, from the charter of the company, the right to erect and keep lamp-posts on the corners of sidewalks in New Orleans was in no way granted it by the Legislature, although that of laying mains on the streets themselves was formally conferred; but the privilege of laying such mains does not imply, unless *ex necessitate*, that of erecting posts at those corners on the sidewalks. The mains are designed to supply gas to all consumers, whether the city, to corporations, or to individuals, and may be and are used for those purposes; but it naturally occurs, that when the city ceases to be a consumer, the right of the company ceases to have lamp-posts on its sidewalks.

Hence, it cannot be claimed that the plaintiff has any absolute contract right to preserve its lamp-posts at those particular spots, and that the action of the municipal authorities has impaired that right, although we do not propose to say that even the city, in the exercise of her police powers, could not, in a proper case, have done by herself what she has authorized another to do.

2. The plaintiff contends, further, that the rights granted by the city to the defendant amount to a monopoly which comes within the ban of Article 48 of the State Constitution.

To this, it is sufficient to answer, that it is a principle, well founded, that no one can be heard to complain of and charge the unconstitutionality of the grant of an exclusive right or privilege, who does not assert a similar conflicting right.

This rests upon the plain and common-sense reason that it must be to such person a matter of utter significance, who exercises that right or privilege, whether he be one that does so exclusively or not.

If it be true that the city has the right to operate the removal, what is it to the plaintiff that the city do it, by her immediate servants, or causes it to be done by some specially designated person, as in the instant case?

3. The last objection to be considered is, whether the city could have exercised the right of removal of the obnoxious lamp-posts.

That right the city possesses as an inherent concomitant of the police power.

So far, that power has not received a full and complete definition; but it may be said to be the right of a State, or of a State functionary, to prescribe regulations for the good order, peace, protection, comfort and convenience of the community, which do not encroach on the like power vested in Congress by the Federal Constitution.

Of that power, it may well be said, that it is known when and where it begins; but not when and where it terminates. It is a power, in the exercise of which a man's property may be taken from him, where his liberty may be shackled, and his person exposed to destruction, in cases of great public emergencies. See *Dillon on Mun. Corp.* 3d Ed. Vol. 1, p. 166-7, and *Barr vs. State*, 34 Ann. 424, where numerous authorities are quoted.

In a kindred case, the United States Supreme Court said:

"The Supreme Court of Indiana placed its decision in support of the Statute, principally upon the ground that it was the exercise of the police power of the State. Undoubtedly, under the reserved powers of the State, which are designated under that somewhat

ambiguous term of police powers, regulations may be prescribed by States, for the good order, peace and protection of the community. The subjects upon which the State may act are almost infinite, yet, in its regulations, with respect to all of them, there is this necessary limitation, that the State does not encroach upon the free exercise of the power vested in Congress by the Constitution. Within that limitation, it may, undoubtedly, make all necessary provisions with respect to the buildings, poles and wires of telegraph companies in its jurisdiction, which the comfort and convenience of the community may require." *Western Union Telegraph Co. vs. Pendleton*, 122 U. S. 359.

A similar question having been presented to the United States Circuit Court in Chicago, Ill., the learned Court held, that it is entirely competent for the city authorities, unless they are bound by some absolute contract permitting the poles and wires to stand as they are, to have them removed, and put an end to such unsightly obstructions as the poles and wire are in the streets. There must be a power somewhere, to cause them to be removed, and to regulate and control the manner in which telegraph lines shall enter, or pass through the city. *Mutual Union Teleg. Co. vs. Chicago*, 16 Fed. Rep. 309.

The city of New Orleans has the undoubted right which a citizen would have, and has, who would have agreed with the Gas Company to illuminate his house for a stated time, and to furnish therefor the necessary appliances. Clearly, at the expiration of the contract, the citizen could require the removal of the appliances, not only because of their appearance, their proving an obstruction to the enjoyment of his property, but also, and particularly, if they were dangerous, some way or other. *Quia placet*, in the end, would be a sufficient reason for the removal.

Now, in the present case, it is clear that the city has the transmissible right to require the removal, not only because the lamp-posts are no longer needed and used for public service, but also because the city needs the very spots on which they happen to have been erected, and it is proposed to utilize those places for other useful and beneficial purposes, and has the exclusive right, under her charter, to regulate the use of the streets and thoroughfares, within her limits.

It is unnecessary to enumerate the benefits expected to be derived from the towers mentioned in the ordinance, the legality of which is maintained, as they are no important factors in the case.

Judgment affirmed.

Reggio vs. McCan.

No. 10,149.

E. REGGIO vs. D. C. MCCAN.

When a plantation owned jointly by a number of persons is mortgaged to secure a debt which they (the mortgagors) alone owe, and the owner of the outstanding interest in the property, not bound for the debt, convey that interest to the mortgagors, his co-proprietors, and waives in favor of their creditor his privilege and mortgage, upon the sale of the plantation to pay the mortgage debt, the creditor, after the full satisfaction of his debt, cannot apply the balance of the price at which the property is adjudicated to the payment of a subsequent mortgage in his favor. He cannot encroach upon the mortgage and vendors privilege of this co-proprietor beyond what is required to pay the mortgage debt, for the benefit of which the waiver was made.

A PPEAL from the Civil District Court for the Parish of Orleans.
Houston, J.

Armand Pilié and Jérôme Meunier for Plaintiff and Appellee :

1. The transfer of a mortgage by its holder to the creditor of a third person, to secure the debt of the latter, is an obligation with an implied suspensive condition resulting from the nature of the contract (Rev. C. C. 2026), whereby the transferor binds himself to pay, or, at least, to abandon his right of mortgage in payment to the transferee, in order to enable him to enforce said right against the mortgagor in the lieu and stead, and in right of the mortgagee, in case of the non-payment of the debt at maturity by the debtor. P. Pont, Vol. 1, on Privileges and Mortgages, Nos. 472, in fine, 473 and 478.

If the debt is then paid in full by the debtor, the condition on which the transferor's obligation was made to depend being defeated, the law will consider the agreement as never having had any existence, and release the transferor from all liability thereunder. Rev. C. C. 2028, P. Pont, *ubi supra*.

But if the debt is only partially discharged, then the deficiency only is to be supplied from the proceeds of the ceded mortgage, for, the transferor's obligation having, on the payment of such shortage, been extinguished by performance (C. C. 2130), he retains his priority over other and subsequent mortgages for the surplus of his claim: *cessante causa, cessat effectus*. 10 Rob., 155; P. Pont, Vol. 1, Nos. 479, 480.

2. Whether the object of a contract entered into with a view to secure the debt of a third person, be the cession of a mortgage claim, or of the mortgage attaching thereto, separately, or of the priority of the mortgage only, the effects of the contract will be the same in each several instance (P. Pont, on Privileges and Mortgages, Vol. 1, Nos. 475, 478), and the following special rules will govern, to wit :

1st. The creditor who enforces the hypothecary right which has been ceded or transferred to him, acts in the lieu and stead, and in right of the transferee, and must exercise or enforce that right in the same manner the latter would himself have done it. P. Pont, on Privileges and Mortgages, same volume, Nos. 473, 475 and 478.

2d. The hypothecary right which has been ceded cannot be made to increase or decrease in the hands of the transferee, and, inasmuch as it attaches to the whole and every particle of the sum it secures, whatever is left of the latter, after satisfaction of the debt in reference to which the transfer was made, reverts to the transferor. 10 Rob. 155, P. Pont on Privileges and Mortgages, Vol. 1, Nos. 479 and 480.

Harry H. Hall for Defendant and Appellant.

Reggio vs. McCan.

The opinion of the Court was delivered by

TODD, J. On the 17th of March, 1880, Alph C. Reggio Louisa and Edward Reggio, mortgaged to Charles P. McCan a plantation situated in the parish of Plaquemines, known as the "Promised Land" plantation, to secure a debt of \$8700.

On the same day Miss Ernestine Reggio sold to the other Reggios, the above named mortgagors, six twenty-fifths of the same plantation for \$7200 and retained a mortgage to secure the payment of the price.

This act of sale contains the following stipulations (quoting):

"It being distinctly understood, however, by and between the parties hereto, that the mortgage which the said Alph. Reggio, in conjunction with Edward Reggio and Louise Reggio, has this day granted upon the above described plantation, in favor of Chas. P. McCan, by an act passed before me notary, shall have preference and priority of rank and privilege over the mortgage and vendor's privilege herein granted, in consequence of the indebtedness due said McCan, arising from matters connected with the present vendor's ownership of part of said plantation prior to this date, and the assumption of such indebtedness by said Messrs. Reggio and Miss Louise Reggio, to the acquittance and discharge of the present vendor."

"And that in case of the sale of the herein described plantation, whatever amount may be due under the aforesaid mortgage granted in favor of said McCan, shall be paid in preference and without regard to the mortgage granted by these presents," etc.

On the 17th of June, 1882, the mortgaged property was sold under foreclosure proceedings, and adjudicated to the mortgagee, Charles P. McCan, for \$16,700.

Of this sum \$3264.50 was applied to the payment of a prior judicial mortgage, and the residue retained by the purchaser.

On the 1st of February, 1883, the property was acquired by the defendant.

Ernestine Reggio having died before this judicial sale took place, Edward Reggio, her testamentary executor, brought suit to subject the said plantation named, and in possession of the defendant as third possessor, to the payment of \$2617.80, being the balance remaining out of the proceeds of said judicial sale, after the satisfaction of the mortgage of Chas. P. McCan, and which, it is claimed, should have been applied to the payment of the mortgage of Ernestine Reggio.

The answer avers that after the payment of the prior incumbrances on the plantation and costs, there remained out of the proceeds of the

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judicial sale made on the 17th June, 1882, \$13,435.50, and in resistance of the plaintiff's demand it is averred.

1. That inasmuch as the respondent's "mortgage claim of \$10,817.70 rested, not alone upon nineteen twenty-fifths of the plantation sold, but upon the entire place; and inasmuch as by her act of sale Ernestine Reggio gave to said mortgage preference and priority of rank over her mortgage and vendor's privilege, which she expressly made subordinate and inferior in rank to the said mortgage of C. P. McCan; and inasmuch as McCan's mortgage was given to secure a debt for which she was primarily liable in part; and inasmuch as her vendor's privilege only rested upon six-twenty-fifths of said plantation, it follows that the sum of \$10,817.20 should be deducted from said balance of \$13,435.50, leaving for *pro rata* distribution the sum of \$2,617.78.

2. "That McCan holding subsequent mortgages upon said plantation, and Ernestine Reggio holding a vendor's privilege only upon six twenty-fifths thereof, she is entitled to \$628.26 only of said residuum, which respondent has always been ready and willing to pay, with 8 per cent per annum interest from June 17, 1882."

There was judgment for plaintiff for the full amount claimed, and defendant has appealed.

The determination of the cause rests entirely upon the construction of the clause in the act of the 17th March, 1880, quoted above, containing the waiver or renunciation of Miss Ernestine Reggio in favor of McCan.

Construed in connection with the circumstances preceding and attending the execution of the act as disclosed by the record, we find no difficulty in discovering what we conceive to be the motive that prompted its execution, and its real meaning and intent.

The mortgage given to McCan by the three Reggios named, though given on the entire plantation, operated only on nine twenty-fifths of it, that being the extent of their interest in it. There was an outstanding interest belonging to Miss Ernestine Reggio of six-twenty-fifths of the property. Miss Reggio evidently desired that McCan's debt should be fully secured, and the reason why she so wished is explained in the writing, being as therein stated, that McCan's debt arose out of matters with which she had been connected as part owner of the land, and the assumption of her indebtedness by her co-owners and her acquittance and discharge therefrom. To remove any doubt about the sufficiency of the security for McCan's debt, she agrees that his mortgage (quoting) "shall have preference and priority of rank and privilege over the mortgage and vendor's privilege herein

Reggio vs. McCan.

granted." This mortgage and privilege was the first mortgage and privilege upon the interest of Miss Reggio's in the land. She waived its rank in favor of McCan, and by this act also subjected her interest in the land to the mortgage given by her co-proprietors over the residue of the plantation, and which but for this act would be free from the mortgage.

The only purpose of this contract on the part of Miss Reggio was to secure the identical debt for which the mortgage had just been executed by the other proprietors. It looked to none other and certainly could not have referred to any subsequent mortgage that McCan might have on the land, and which at the time of her contract was not even in existence. Nor did she bind herself personally for the debt, but her engagement was strictly limited by the language of the act to giving the preference to McCann's mortgage over the portion of the land on which her own mortgage and vendor's privilege rested. And what was the full scope of her obligation under this waiver or renunciation? It was simply that any deficits there might be after exhausting the mortgaged property of his debtors, should be made good out of the proceeds of her portion of the land on which her mortgage and privilege operate. This is plainly the full extent of Miss Reggio's liability, without invoking or considering the elementary rule of construction substantially to the effect that if from the language of a written instrument any doubt can exist as to the fact of liability or extent of the liability of an obligor, it must be construed most favorably to such obligor.

The mortgage of McCan was enforced against the plantation and it was sold. The debt was then, with interest and costs, \$10,817.70. The property brought \$16,700. From this total was deducted \$3264.50, leaving for distribution in the sheriff's hands \$13,435.50. Out of this McCan's entire debt was paid, leaving a balance of \$2617.80. This balance the plaintiff, as the legal representative of Ernestine Reggio, claims should be applied to paying the mortgage and privilege in favor of her estate and the defendant, McCan, contends that nineteen twenty fifths of this residuum should be applied to the extinguishment of his subsequent mortgage on the property, leaving to the plaintiff only the excess of such proceeds over such mortgages, amounting to \$628.26.

The judge of the first instance rejected this contention or proposition and gave judgment in favor of the plaintiff for this balance or residuum after the full satisfaction of McCan's mortgage. We think the judge was right, and his judgment is affirmed.

State vs. Young.

No. 10,156.

STATE OF LOUISIANA VS. JESSIE YOUNG.

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In considering bills of exception which contain conflicting recitals by counsel and by the trial judge, the Supreme Court will be guided by the statements made by the judge.

A PPEAL from the Fifteenth Judicial District Court, Parish of St. Landy. *Lewis, J.*

M. J. Cunningham, Attorney General, and *John N. Ogden*, District Attorney, for the State.

E. P. Veasie and *Chas. W. Duroy* for defendant.

The opinion of the Court was delivered by

POCHÉ, J. Appellant, who was convicted of manslaughter under an indictment for murder, complains of an erroneous ruling of the trial judge made under the following circumstances :

During the examination of a State witness, who was a deputy sheriff, the district attorney asked him the following question :

"Did the accused run away when he struck the man?" To which the witness gave the following answer: "I was so informed when I first arrived at the place where the killing was done."

The bill informs us that counsel for the accused objected to the evidence, but the recital is conflicting as to the precise objections which they urged.

That part of the bill which was drawn by the attorneys of the defendant contains the statement that the objections were that the evidence was inadmissible, because it was parol testimony, and because it was hearsay.

But the latter portion of the statement is denied by the trial judge, who declares very emphatically that the only objection urged by counsel was the ground that flight could not be proved by parol testimony.

Thus the case presents one of those frequently occurring and withal very unpleasant conflicts of statements between counsel and the trial judge.

In keeping with the well established rule, we must be guided by the statement which emanates from the judge.

We can but repeat here what we said in the case of *Waggoner*, 39 Ann. 920: "With due deference to counsel, we must be guided by the bill which is the recital of the incident under the signature of the trial judge. We have had frequent occasions to announce and to

Succession of Sparrow.

follow this rule, which we feel compelled to adhere to, as long as proper means are not resorted to or provided for the purpose of adjusting differences of that nature which arise between judge and counsel."

Under the judge's version, the objection remains without force, as it is clear that parol testimony is competent to prove flight of an accused in a criminal trial.

Defendant's counsel had reserved two other bills, but as they do not refer to either of them in their brief, we pass them over with like silence.

Judgment affirmed.

No. 10,139.

SUCCESSION OF MRS. MINERVA SPARROW.—OPPOSITION TO ACCOUNTS
AND TABLEAUX OF CHRIS. CHAFFE, JR., ADMINISTRATOR, AND
HEIRS OF MRS. M. SPARROW VS. CHRIS. CHAFFE, JR., ADMIN-
ISTRATOR.

(Consolidated.)

An administrator is entitled to credit for moneys paid out for the repair or preservation of plantation buildings and machinery, also for insurance on gin-house, though the policy issued in the name of the factor or commission merchant for the estate.

A daughter of the intestate, who occupies with her minor children a plantation dwelling-house, should not be charged rent, where she has not contracted to do so, and where the building is not needed for the administrator or a tenant and is not required for the cultivation of the plantation.

Where an administrator has conducted planting operations and a mercantile business on account of the succession, and two of the three legal heirs have agreed that their shares in the succession shall be responsible for the debts contracted by the administrator for this unauthorized cultivation of the succession plantation, they do not bind themselves personally for the debts, nor are their shares liable for more than a third of the debts. Nor are the heirs committed by such agreement to correctness of the account and estopped from disputing it. Nor will a judgment decreeing the liability of such shares for the debt be held as *res judicata* against their right to dispute it, or show its payment or extinguishment.

Where the administrator has employed competent and experienced attorneys, who are fully capable alone to perform every service required of them pertaining to the regular and usual administration of the succession, he is not authorized to employ at the expense of the succession other attorneys, whose services are directed mainly to the enforcement of a large claim against the succession in favor of a firm of which the administrator is a member. Their fee is not a proper charge against the succession.

The entire commissions of an administrator of a large succession are not properly exigible before the administration is terminated. Prior to this his commissions on sums received and distributed should be paid, and his rights as to the residue reserved for his final account. He is entitled to commissions on the rentals of the plantation, though leased by himself.

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44	476
40	484
48	1211
40	484
114	823

Succession of Sparrow.

A PPEAL from the Eighth Judicial District Court, Parish of East Carroll. *Deloney, J.**W. G. Wyley, F. F. Montgomery and E. D. Farrar for Opponents :*

1. Where there is no will, heirs can at any time take possession of the succession on giving security to the creditors of the succession, if they require it. Minor heirs may be legally put in possession the same as the major heirs. 24 Ann. 270; 25 Ann. 56, 320; 21 Ann. 278; 29 Ann. 347; 30 Ann. 93, 128, 176; 10 Ann. 169.
2. Heirs can take possession, under Article 1012 R. C. C., before the estate is wound up and debts paid. *Soye vs. Price*, 30 Ann. 96; 27 Ann. 686; 25 Ann. 225, 235; 29 Ann. 347, 237; 30 Ann. 144. See also Succession of E. S. Powell, *Van Bibber vs. Cosley*, Admr., 38 Ann. —.
3. A succession, a juridical person, cannot contract debts without authority of court, and the administrator cannot, of his own motion, imperil the succession by engaging in meretricious and planting pursuits; he can bind himself and the major heirs, if they are his sureties or guarantors, but such debt, not owing by the estate, cannot be set down on the tableau. 23 Ann. 189, 428; 25 Ann. 562; 21 Ann. 287; 22 Ann. 372; 24 Ann. 83; 26 Ann. 680.
4. As the debts of a major heir, whether as principal or surety, are distinct from the debts of the succession, they cannot be set down on the tableau and tried in the *concursus*, which is a probate proceeding; the obligations of such major heir, whether as principal or surety, are personal to him, and he should have the right, when sued in a court of competent jurisdiction, to plead, answer, or demur, to file a reconventional demand (if he has one), and he should not be condemned without a hearing under the pretense of an estoppel. 2 Ann. 413; 5 N. S. 52^o.

*J. M. Kennedy for John Chaffe & Sons, Appellees.**Montgomery & Ransdell for Administrator, Appellee :*

1. It is the duty of an administrator of a succession to make all repairs to succession property that are absolutely necessary to preserve the property from destruction, and he is entitled to be paid by the succession for all such repairs. See Arts. 1147 and 2314 C. C.; 33 Ann. 745; 24 Ann. 253.
2. If an administrator allows property of a succession to be lost and destroyed by his neglect to make usual and customary repairs, he will be personally liable to the succession for the loss.
3. A lessor is bound to make all repairs that incidentally become necessary, and result from decay. If lessor refuses or neglects to make necessary repairs, the lessee may make them and deduct from the rent. Art. 2692 *et seq.* C. C.; 36 Ann. 888, *Ross vs. Zuntz*.
4. Where the qualities of lessor and lessee are united in the same person, through his representative and his individual capacity, it would be a vain thing for the lessee to put the lessor in default before making necessary repairs. Hence, default would not be necessary in such a case.
5. A lessee has a right to remove all movable improvements placed by him on leased property. 36 Ann. 888, *Ross vs. Zuntz*.
6. An administrator in the exercise of a sound discretion may insure property under his administration belonging to a succession, and the costs must be borne by the succession. 2 R. 103; 3 Ann. 396; 12 Ann. 96.
7. Heirs who occupy a portion of the succession property are liable for the rents. 27 Ann. 550; 30 Ann. 1138.

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8. An administrator may retain property of a succession in his hands until his accounts are finally homologated and all his claims against the succession paid. Art. 1007 C. P.; 4 Ann. 223, Succession of George.
9. To terminate the existence of a succession, all the heirs must be *sui juris*, and have capacity to render themselves unconditionally liable for the succession debts. This a minor cannot do. 30 Ann. 388, 743.
10. While a succession is under administration, the heirs have no right to interfere with it, and have nothing to claim until the debts are paid and the succession legally terminated. 31 Ann. 495, *Cestac vs Florane*.
11. In fixing the value of attorney's fees, the court will look into the whole record, and two factors will enter into the discussion: One is the extent and kind of service, and the labor incident to its rendition; the other is the ability of the party who is liable to pay. 21 Ann. 687, *Cullom vs. Mock*; 30 Ann. 336; 31 Ann. 130, Succession of Linton.
12. When it appears that the services of an attorney in settling up the complicated affairs of a succession have been long continued, wisely directed, and valuable, the court will be guided as to the money value of his services (in the absence of special agreement as to his fees, and of specific evidence as to extent of his services) by the opinion of the local bar to which he belongs. Succession of Jackson, 30 Ann. 463.

The opinion of the Court was delivered by

TODD, J. To understand fully the issues involved in these cases, a brief reference is necessary to a case which was before this Court last year, entitled "*Succession of Mrs. Minerva Sparrow; Opposition to accounts. etc.; Decker, Guardian, vs. C. Chaffe, Jr., Administrator,*" and reported in the 39 Ann. p. 696.

From the decree then rendered we quote as follows:

"It is ordered, adjudged and decreed that the two provisional accounts of administration herein rendered and filed by Chris. Chaffe, Jr., administrator. and the tableau of debts charged against said succession, also presented by said administrator, be and the same are hereby each and all annulled, cancelled and rejected, under and subject to the rights hereinbefore reserved in favor of said *administrator and the firm of John Chaffe & Sons* touching their claims against the two heirs of age for moneys advanced and for expenses of cultivating the succession plantations, and in favor of the administrator for moneys advanced for the maintenance of the minor heirs—Mary and Kate Decker.

"It is further ordered that Chris. Chaffe, Jr., administrator, be required to present forthwith a provisional account of administration and tableau of debts which may be due by said succession, from which he shall exclude as debts due by said succession all expenses incurred in the cultivation of succession plantations, either by himself or Edward Sparrow, former administrator of said succession, and all items of indebtedness due to John Chaffe & Sons, either by A. M. Ashbridge or by Edward Sparrow personally."

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To understand fully the nature of the reservation made in this decree, it appears from the report of that case that in the account filed by the administrator a large indebtedness was charged against the succession of Mrs. Sparrow in favor of John Chaffe & Sons incurred in the cultivation of a number of succession plantations by Edward Sparrow, the surviving husband of the deceased, and former administrator of her succession, and by Chaffe, the present administrator, which was decided to have been unequal and unauthorized. It was claimed, however, that two of the heirs of age of the said deceased—Mrs. Foster and Mrs. Ashbridge—had, by a written agreement, made themselves responsible for this large debt to the extent of their interests in the succession.

This fact is referred to in the body of our former decree and the reservations further explained in the following language (quoting) :

“We, therefore, deem it our duty to reserve the rights of John Chaffe & Sons and of the present administrator, to enforce their respective claims against the two heirs of age, on account of the latter's liability for expenses incurred in the cultivation of the plantations of the succession, by proper proceedings, in *due course of administration*.”

After the case was remanded under this decree, the heirs of Mrs. Sparrow filed a petition to be recognized as her heirs at law, and to be put in possession of her succession, and that Chaffe, administrator, be ordered to render an account of his administration.

In this proceeding for recognition, and to be put in possession, John Chaffe & Sons intervened and opposed the major heirs, Mrs. Foster and Mrs. Ashbridge, going into possession of the estate, unless they first paid his claim against them, or, in the alternative, gave security for its payment.

The filing of this intervention was excepted to on the ground that John Chaffe & Sons, not being creditors of the succession of Mrs. Sparrow, they were without interest to intervene in this proceeding or any other relating to her succession.

The exception was overruled and the intervention allowed.

On the 5th of August, 1887, Chaffe, administrator, filed an account, and subsequently a supplemental account, and two tableaux—one tableau purporting to represent or show the debts against the succession as a legal entity, and the other the debt referred to in the reservation made in the previous decree, for which the heirs of age, or rather their shares in the succession, were claimed to be liable.

This item is mentioned and described in the tableau thus :

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“Claim of John Chaffe & Sons, for expenses incurred in the cultivation of the succession plantations by Edward Sparrow, former administrator, as set forth and ordered in said decree, one-half thereof to be paid out of the share of said Mrs. Foster and said Mrs. Ashbridge, respectively, viz: \$21,000.05 out of each of said shares, equal to \$42,000.04.”

In the account, the administrator charged himself for rent of plantations from 1883 to 1887, inclusive, and a few debts collected, amounting in all to \$19,008.28. He credits himself with payment made on account of repairs, taxes, attorneys' fees, costs, commissions, etc., amounting to \$12,227.53, leaving a balance in his hands of \$6780 for distribution among the heirs. This sum he proposes to divide into three equal parts, and to credit the portion thereof of the minors to account of advances made to them by the administrator for their maintenance, and those of the major heirs, Mrs. Foster and Mrs. Ashbridge, to the plantation account in favor of John Chaffe & Sons, under their agreement subjecting their shares in the estate as security for the debt.

These accounts and tableau of the administrator were opposed by the major heirs and tutor of the minors, the opposition extending to the entire accounts, save as to certain items admitted to be correct.

The opponents further charge maladministration and mismanagement on the part of the administrator.

They are, in substance, that the succession owed no debts when it was opened, but after seven years of administration, the administrator reports the debt of the succession, or of the heirs, at \$51,831.13.

That the gross revenues since August, 1883, when the present administrator took charge, aggregated only \$14,564.84, against expenses, as alleged, of \$20,254.84.

It is further charged that the standing crops on the succession plantations on the 5th of August, 1883, when the administrator went into possession, were inventoried and appraised at \$16,780.50, and a stock of goods in the Midland store was inventoried at \$1379.65, of which the administrator makes no account whatever.

Mrs. Foster and Mrs. Ashbridge made special opposition to the claim or charge of John Chaffe & Sons, directed against their shares in the succession, on the ground that such a claim was improperly included in the administrator's account; that it was in the nature of a demand, and against them as heirs, and not against the succession, and one, which it had been decreed, the succession did not owe, and, therefore, could not be legally urged in a probate proceeding, nor

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enter into an administrator's account. That the alleged indebtedness is charged *in globo* wherever they were entitled to be informed, by proper proceedings, of the precise nature of the demand and to have over of the accounts on which it was based, and further entitled to plead, answer or demur, after having been regularly sued, and ought not to be condemned, without a hearing and without trial, in a court of ordinary jurisdiction. Subject to this exception, they answered, denying the existence of the debt, and charging that the claim was false and fraudulent throughout."

It was also charged by them that certain writings, designated as X, Y and Z, on which the liability of their interests in the succession to John Chaffe & Sons purports to be founded, were signed by them in error—an error induced by the false and fraudulent representations of Chaffe, administrator, and one of his attorneys. That they were made to believe, by these representations, that the succession of their mother, Mrs. Minerva Sparrow, was largely indebted to said firm of John Chaffe & Sons, and that their only hope or chance for realizing anything from the succession was by executing these agreements purporting to bind their said interests as surety for advances and supplies made to the plantation by the firm of John Chaffe & Sons.

Mrs. Foster, in her own behalf, further represents, in substance, that she was induced by like false and fraudulent representations, by the same parties, to consent to the preparation and filing of an intervention in the proceeding relating to the provisional account and tableau filed by Chaffe, administrator, in 1885, by which it is sought to establish the liability aforesaid for the acts and gestion of her father, Edward Sparrow, decreeing his irregular administration of her mother's succession, and his illegal cultivation of the plantations of the estate. She avers that, owing to said misrepresentations and deceptions practiced upon her, that she is in no way bound by said pretended intervention.

Pleas of *res judicata* and estoppel were filed against the major heirs, under which it was contended that they were debarred from disputing the correctness of the claim urged against them or the mode of its prosecution.

These pleas were sustained.

The proceeding of the heirs to be put in possession, and their opposition to the accounts and tableaux were consolidated and tried together and judgment rendered substantially as follows:

The account and tableau were approved and homologated except as to certain charges of insurance and expenses growing out of the plant-

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ing operations, amounting in all to \$466.36, and the tableau was amended by rejecting the claim of D. B. H. Chaffe for attorney fee; by reducing the fee of Montgomery and Randell from \$4117.50 to \$2862.75, and the commissions of the administrator from \$2134.42 to \$1680.40, and in all other respects, the account, as relates to the succession, was approved and homologated. The pleas of *res adjudicata* and *estoppel* and *prescription* were sustained. Mrs. Foster and Mrs. Ashbridge were each condemned to pay \$21,000 to John Chaffe & Sons, and said amounts were made a charge against their respective shares in the estate of Mrs. Minerva Sparrow, to be paid after the settlement of the debts of the succession, and the administrator ordered to retain the amounts owing them, and also the amounts due by the minor heirs, advanced for their maintenance.

The demand of the heirs to be put in possession of the estate was rejected except on condition of their giving bond to secure the debts recognized against their respective shares.

From this judgment the heirs of Mrs. Sparrow appealed, and also D. B. H. Chaffe, whose claim for an attorney's fee was rejected. In this court Chris. Chaffe, administrator, in answer to this appeal, prays the amendment of the judgment by allowing the items of his account rejected by the lower court, being for \$414 80 for insurance in gin-house, \$750 charged by the administrator against Mrs. Ashbridge for rent of a plantation dwelling-house.

I.

Account of administrator filed 5 August, 1887, and opposition thereto and supplemental account.

The administrator charges himself with \$19,008.29, being almost exclusively for rents of plantation from July 5, 1883, to and including the year 1887, at \$4000 per annum—the rental fixed by our former decree

He credits himself for payment made on account of the succession with \$12,227.53, leaving a balance in his hands of \$6780.76, which he proposes to apply towards the payment of the debts of the heirs.

Of these credits the opponents admit the correctness of \$6090.36, leaving in dispute \$6137.17.

The main items opposed are those for repairs, attorney fees and commission of administrator.

(a) The contention of the opponents is that none of the credits claimed for repairs and improvements should be allowed for the reason that by the terms of the decree of this court the credit of the administrator were restricted to taxes paid and commissions, the language

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of the decree being: "That he shall charge himself as rent for the plantations and their appurtenances during the whole time he cultivated them at the rate of \$4000 per annum for the whole, subject to deduction of taxes and administrator's commissions.

It is proved to our satisfaction that all the repairs made and paid for, which compose the items objected to, were such repairs as, in our opinion, were necessary for the preservation of the plantation buildings and machinery.

Independently of the decree referred to, it was the duty of the administrator to preserve the property and defray the expenses for such preservation; and to find in the decree any prohibition of an expenditure for such an essential purpose would be giving too narrow a construction to its language. The judge *a quo* rejected the opposition to this item, and we shall not disturb his ruling on this point.

The credit claimed for insurance on the gin-house was of a like character as those for necessary repairs, but the judge rejected this charge, and there is a prayer for an amendment in this respect. It is objected to on the ground that the policy issued in favor of John Chaffe & Sons, but the evidence makes it certain that though thus issued, the property covered by the insurance was the gin-house on one of the succession plantations, and the succession should pay it; and the amendment is allowed. The amount of the item is \$414.80.

(b) The attorney fees charged are as follows:

Montgomery & Ransdell.....	\$5,017 05
Less amount paid.....	900 00
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Balance claimed.....	\$4,170 00
Bayne & Dengré.....	250 00
D. B. H. Chaffe.....	250 00

Total.....	\$5,617 00
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The fee of Montgomery & Ransdell was reduced to \$2862, and, adding the \$900 already paid, made it \$3762.75.

A great deal of the litigation attending the settlement of this succession has been caused by the attempt to enforce against the succession the personal debt of Gen. Sparrow, contracted during and on account of his unauthorized cultivation of the succession plantations, and which debt was rejected by our former decree as a charge against Mrs. Sparrow's succession. Therefore the professional services of these attorneys in this respect, at least, cannot be regarded as enuring to the benefit of the succession.

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We have carefully examined the record and considered the proceedings with special reference to making a just estimate of the services rendered by these gentlemen, and we think they should be allowed a fee of \$3250, and deducting the \$900 received by them, would leave a balance due them of \$2350; this to include services rendered and to be rendered in the settlement of the succession, and the judgment appealed from must be amended conformably to this conclusion.

The fee of D. B. H. Chaffe was properly rejected. His services were directed towards supporting the claim of John Chaffe & Sons, and there was no need of his help in any way relating to the usual and required services of attorney attending the administration of successions. The regular attorneys of succession were able, skillful and fully competent of themselves to discharge the duties and responsibilities pertaining to their employment.

The fee of Messrs. Bayne & Denegré was for services rendered the administrator. They were doubtless valuable to him and to the succession, but they were not indispensable, and were in the line of those services which strictly devolved upon the regular attorneys of the succession, and which the administrator should have required of them. If he, a non-resident of the parish where the succession was opened, accepted the administration of it, and found it a matter of convenience to consult attorneys at the place of his residence instead of the regular attorneys for the succession, the charge should not fall on the succession, especially in view of the fact that a full and adequate compensation was allowed the latter for all services required in the administration of the succession. This charge, therefore, should have been rejected.

(c) The commissions charged by the administrator amount to \$5,017.05. The administration is not yet closed, and we do not think that the succession should now be taxed with the entire commissions. These are only properly exigible upon a final settlement, to be adjusted in the final account.

Without, therefore, determining whether the charge is correct or not as to the amount claimed, we think it proper that the commissions of the administrator at present should be confined to the sums received by him for or on account of the succession since he took charge of it. The sums so received he reports at \$14,964.10, upon which he properly charges a commission of \$374, which is approved, and the right is reserved to him to claim the residue of his commissions to be settled in the final account.

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II.

The account of John Chaffe and Sons, which was rejected by our decree in the former appeal as a charge against the succession of Mrs. Minerva Sparrow, was properly placed on the administrator's account. This became proper and even necessary from the terms of the former decree. It is too late to question the correctness or propriety of that decree in this regard. Whilst rejecting the claim as a charge against Mrs. Sparrow's succession, we held, substantially, that the major heirs of Mrs. Sparrow, or, at least, their shares or interests in their mother's succession were surety for the debt to be paid, if required, in due course of administration. That necessarily implied that their shares in the estate should be ascertained and fixed by the final settlement of the succession under administration. And until a partition could be made, of course, the entire assets of the succession, including the shares of these heirs, would remain in the hands of the administrator, who, by the terms of the decree, was authorized to apply them, as far as might be necessary, to the payment of the account of John Chaffe & Sons.

The judge *a quo*, however, seemed to consider that the respective shares or interests of these heirs were liable each for one-half the debt. This was a mistake. These heirs are not personally bound for any part of the debt. Only their shares in the succession are made subject to it under their engagement or contract. Had they been personally liable as heirs, they could only have been bound to the extent of their virile shares, and such shares, each being one-third of the estate, there being in all three heirs, are each bound only for one-third of the debt.

The plea of *res adjudicata* presented by the accountant was properly sustained, at least to this extent, that this claim of John Chaffe & Sons should be placed on the account, and settled contradictorily with these heirs in due course of administration, and their respective shares in the succession to be liable for the debt under their guarantee in favor of these creditors. At that time Mrs. Foster, one of the heirs, acquiesced in this view of the matter, but since the decree was rendered she has shifted her position and seeks now to be relieved from her obligation of guarantee or suretyship on the grounds of fraud and error, of a similar character urged by Mrs. Ashbridge in the previous appeal. In that case we passed on the grounds of error and fraud set up by Mrs. Ashbridge, and ruled that they were insufficient to relieve her from her agreement. So, in like manner, we have carefully considered in the instant case the fraud and error charged by Mrs. Foster

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against the obligation as relates to herself, and have reached the same conclusion as we did in relation to Mrs. Ashbridge.

The judge, however, erred in extending the scope of the plea beyond this.

There was nothing, however, in our former decree that adjudged these opponents or their interests in their mother's succession to be liable for the claim or account of John Chaffe & Sons as presented and reported in the account, or any portion of it. The correctness of the account as against any one was not determined. In that case it was prosecuted as a just claim against Mrs. Sparrow's succession exclusively. As such it was rejected by the court, with the right reserved to the creditors to prosecute it against her major heirs in the manner now being done to the extent of their interests in the succession.

The question as to the correctness of this account as relates to these opponents is still an open one; and the judge *a quo* was, therefore, in error in excluding all evidence in opposition to the claim or going to show its extinguishment by payment or otherwise.

This refers especially to that feature in the opposition, wherein it was sought to charge the administrator with the proceeds of the cotton crops growing on the succession plantations when the accountant entered on his administration and took possession of the estate. The cotton crop was alleged to have been sold for \$36,000, and besides there was a stock of goods and other things for which an account was sought from the administrator.

True, these crops did not belong to the succession of Mrs. Sparrow, for which reason mainly an inquiry about them was suppressed, but it was for this very reason that they did not belong to Mrs. Sparrow's succession, and consequently must have belonged to Gen. Sparrow's succession, that this inquiry sought should have been permitted.

These major heirs or their succession interests are not sought to be held liable for this indebtedness by reason of their heirship of their mother, but solely on account of their father's acts and administration.

The only matter to be determined upon this branch of the case was how much did Gen. Sparrow or his estate owe John Chaffe & Sons for advances and supplies furnished him during his illegal administration of the succession and for the cultivation of its plantations, and for which these heirs have bound their interests to the extent stated. The only way to ascertain this indebtedness was to credit Chaffe & Sons with all they had supplied or advanced to these plantations or to Gen. Sparrow for their cultivation, and to debit them with all they received in cotton or other things from the plantations or from Gen

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Sparrow or the present administrator. It was only by liquidating this indebtedness between these creditors and Gen. Sparrow that it was possible to ascertain or fix the amount, if any, for which the shares of these heirs in the succession of their mother could be made responsible, and ascertain the precise sum that the administrator was authorized, under our previous decree, of applying to his firm's claim.

It was certainly not the intention of this Court, whilst extending to John Chaffe & Sons the right to prosecute their claim against these heirs in this probate proceeding—and but for the peculiar exigencies of the case, a very irregular proceeding—and at the same time deny these parties the privilege of a full inquiry into the merits of the claim, and at the same time shut them off from any and all defenses they would otherwise be authorized to make against it. No; in remitting the parties to this mode of proceeding, it was with a full reservation of their respective rights as plaintiffs and defendants, creditors and debtors.

III.

We think the plea of prescription urged by the major heirs against the claim or account of John Chaffe & Sons was properly overruled. So far as the proceeding then to make liable their shares in the estate to the payment of the debt, it was not subject to the terms of prescription pleaded against it. Besides, we consider that prescription was interrupted by the present and past proceedings taken by the creditors looking to the enforcement and realization of their claim.

IV.

The judgment of the lower court rejected the demand of the heirs to be put in possession of the estate, except on the conditions mentioned—i. e., that the major heirs should first pay, or give bond to secure, the claim of John Chaffe to the extent of their engagement, and the minors should pay or secure the advances made to them by the administrator since the opening of the succession.

The right is given by pristine law to the heirs of a deceased person to take possession of his estate, though under administration, upon paying the debts of the estate, or giving the prescribed security therefor.

This right the heirs in this instance would be entitled to demand, except for the obstacle interposed, growing out of their agreement respecting the indebtedness of their father to John Chaffe & Sons, and the former decree of this Court prescribing the mode by which that agreement was to be enforced. The shares of the heirs in the succes-

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sion of Mrs. Sparrow was to be ascertained in the final settlement of her succession, and those shares, in due course of administration, were to be applied, if required, to the payment of the debt in question.

To permit them to take possession of the estate before these conditions were fulfilled, or they discharged therefrom, would be virtually to annul this former decree. So, as to the major heirs, we think the conclusion of the judge was in this regard wise and conservative, and it will not be disturbed.

As to the minor heirs, however, their right to go into possession of the estate to the extent of their interest therein, is burthened with no such abstracts. They are in no manner bound to John Chaffe & Sons for this debt. All the debts of Mrs. Sparrow's succession have been discharged, or there are funds to do so. The minors may be indebted to the succession or the administrator for advances made to them for their maintenance; but this does not debar them from the exercise of this clear legal right. Besides, even if the law did not provide adequate powers to enforce any claim the administrator might have against the minor heirs, it is evident that the administrator already has in his hands funds that can be applied to the satisfaction of any demands against them. As to the minor heirs, therefore, the judgment must be reversed and they put in possession of the succession or their undivided interests therein, subject to the condition only that they be charged with one-third of the commissions of the administrator upon the entire succession.

This completes the review of all the questions and issues embraced in this appeal, and from the conclusions announced above respecting some of them, it will be seen that it necessitates the remanding of the cause for the determination, at least, of some of the matters in controversy.

It is, therefore, ordered, adjudged and decreed that the judgment of the lower court be amended in the following particulars, to-wit:

1. That the administrator be allowed credit on his account for the sum of \$466.36, being for insurance and repairs on plantation buildings, which charge is now approved.

2. That the credit claimed for the fee of Bayne & Donegre be rejected.

3. That the fee of Montgomery & Ransdell be fixed at \$3250, subject to a credit of \$900 already paid, leaving balance of \$2350 due.

4. That the commissions of the administrator now exigible be reduced to \$374, with the right reserved to recover the residue to which they may be entitled at the final settlement of the succession.

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5. That the accounts of the administrator and tableau of debts so far as relates exclusively to his administration of the succession of Mrs. Minerva Sparrow, as thus amended, be approved and homologated, and the judgment of the lower court, as thus amended, be affirmed.

6. That the judgment overruling the plea of prescription filed by the major heirs be affirmed.

7. That the judgment so far as it rejects the demand of the major heirs to be put in possession of the estate, except upon the terms and conditions therein imposed, be also affirmed; but that in so far as it rejects the demand of the minor heirs or their tutor to be put in possession of their interests therein, or to the extent of their interests, that it be reversed, and that the said minors, through their tutor, be put in possession, subject only to the charge of being liable for one-third of the commissions of the administrator on the entire succession, to be paid out of their funds in the hands of the administrator.

8. That the pleas of *res adjudicata* and estoppel against the major heirs be overruled and the judgment therein amended to the extent expressed and indicated in the body of this opinion.

9. That in all other respects the judgment be annulled, avoided and reversed, and the cause be remanded to the lower court for the sole purpose of determining the amount, if any, that the shares or interests of the major heirs of Mrs. Minerva Sparrow, deceased—Mrs. Foster and Mrs. Ashbridge—are liable for to John Chaffe & Sons growing out of their written agreement touching the cultivation of the plantations of the succession by Edward Sparrow and Chris. Chaffe, administrator, and the advances made and supplies furnished by said firm for the purpose of said cultivation, and also for adjusting any indebtedness of all the heirs for advances made them by the succession or by Chris. Chaffe, administrator, reserving to all parties the right of full inquiry relating to said indebtedness claimed by John Chaffe & Sons, and the benefit of all legal pleas and defenses germane thereto, except such as may have been passed on and determined by this Court, and as fully as the same would be permissible under the ordinary jurisdiction and practice of the courts.

The costs of both courts as relates to the accounts and tableau pertaining exclusively to the succession and its administration as an entity be paid by the succession, and all other costs to abide the final determination of the controversy still left open by this decree.

 Kelly vs. Lyons.

No. 10,150.

JOHN F. KELLY VS. ISAAC L. LYONS.

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When a party, about to be sued, is presented by his adversary with a petition addressed to a particular court, and endorses thereon his acceptance of service, waiver of citation and confession of judgment, and when, two days afterward, said petition and confession are filed in court and judgment rendered thereon, defendant cannot claim that such judgment is a nullity, because violating Art. 162, C. P., prohibiting election of a domicile (other than his own) for the purpose of being sued.

The confession of judgment was a pleading to the merits, and being filed with his authorization, its effect is to be governed by the date of filing and not by the date of its preparation.

Having thus pleaded to the merits, without exception to the jurisdiction, the judgment rendered is valid.

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

Merrick & Merrick for Plaintiff and Appellant :

A confession of judgment on a petition addressed to a judge in a jurisdiction outside of the domicile of the debtor, to be subsequently filed in such jurisdiction beyond the domicile, is virtually a waiver of domicile, and prohibited by Articles 89, 92, 129 and 162 of the Code of Practice. Revised Stat. 1870, Sec. 1204.

This recognition of the incompetent judge by the debtor, in a proceeding subsequently to be filed, is not within the exception contained in Article 93 of the Civil Code. *Phipps vs. Snodgrass*, 31 Ann. R. 91, and is void.

Farrar, Jonas & Kruttschnitt for Defendant and Appellee :

1. It is now the settled jurisprudence of this State that there is no conflict between Art. 192, C. P., as amended by the Act of 1861, and Articles 93, 333 and 335; and that the Act of 1861 was intended only to invalidate agreements electing a domicile for the purpose of being sued. *Jex vs. Keary*, 18 Ann. 89; *Marqueze vs. Leblanc*, 29 Ann. 194; *School Board vs. Weber*, 30 Ann. 595; *Phipps vs. Snodgrass*, 31 Ann. 88; *Stevenson vs. Whitney*, Tax Collector, 33 Ann. 655; *Stackhouse vs. Zuntz*, 36 Ann. 531.
2. The contrary jurisprudence established by *Richardson vs. Hunter*, 23 Ann. 255, and *Simpson vs. Hope*, Idem, 358; *Bush & Goode vs. Chapman*, 24 Ann. 277, and other cases, has been expressly overruled by the above authorities.

The opinion of the Court was delivered by

FENNER, J. On the 8th day of February, 1886, Lyons filed in the Civil District Court a petition against Kelly upon notes and accounts aggregating \$4250. The petition, when filed, contained the following endorsement: "Service of the foregoing petition accepted and citation waived, and judgment confessed in favor of plaintiff, as therein prayed for, with interest and costs," which endorsement was signed by Kelly and duly acknowledged before a notary public, on February 6, 1886.

On February 10, 1886, judgment was rendered against Kelly, as

Kelly vs. Lyons.

prayed for, which recites as its reasons, "considering the written confession herein on file, and on producing due proof in support of the demand, the law and evidence being in favor of plaintiff."

In February, 1887, a writ of *feri facias* was issued, addressed to the sheriff of the parish of Winn, under which certain property of Kelly was seized and sold, and the writ was returned partially satisfied.

On May 10, 1887, Kelly filed an action to have the judgment declared a nullity, on the grounds that, at the date of his waiver of citation and confession, and of the filing of the suit and the rendition of the judgment, he was a resident of the parish of Winn, which "is not within the jurisdiction of the Civil District Court of Orleans, and that the said court has no civil jurisdiction of the person of your petitioner, and that the judgment aforesaid is void and of no effect, having been rendered in violation of Articles 90 and 162 of the Code of Practice."

To this petition, of which the original proceedings were made part, Lyons filed an exception of no cause of action, which was sustained in the court below, from which judgment of present appeal is taken.

The sole question is, whether the case, on the showing made, is controlled by the concluding paragraph of Art. 162, C. P., which lays down the general rule that a party must be sued at his domicile, "and shall not be permitted to elect any other domicile or residence for the purpose of being sued, subject to those exceptions expressly provided by law;" or by Articles 93, 333, 334, 335 and 336, the last four of which provide, in effect, that exceptions to the jurisdiction, *ratione personæ*, must be pleaded *in limine*, and the first declares that, in absence of such exception, the judgment rendered shall be valid, notwithstanding the suit may have been brought elsewhere than at the domicile. We consider it beyond question that the case is governed by Art. 93.

Knowing that he was to be sued forthwith, and presented, indeed, with a petition actually drawn for the purpose and addressed to a particular court, he endorses thereon his acceptance of service, waiver of citation and confession of judgment. It is evident, and not disputed, that this gave authority to the attorney who drew the petition to file in court his endorsement, and the act of filing, being done by his authorization, was his act, and is to be treated precisely as if, on the filing of the petition, he had himself appeared in court and entered the confession. Such confession was a pleading to the merits, and the judgment thereon was valid under the very terms of Art. 93.

The mere reading of the recent cases interpreting Art. 162, C. P.,

 Levy vs. Hitsche.

will show that this is not the election of domicile which is prohibited by either the letter or spirit of that article. *Phipps vs. Snodgrass*, 31 Ann. 88; *Stevenson vs. Whitney*, 33 Ann. 655; *Stackhouse vs. Zuntz*, 36 Ann. 531.

In the last case we broadly said: "It is now the settled jurisprudence that parties may, by consent, waive personal jurisdiction and submit their controversy to the determination of another tribunal than that of their domicile, having jurisdiction over the subject matter, and that this latter thereby becomes vested with complete jurisdiction over the matter."

It is true, that this applies generally to waivers made in pending suits; but when the waiver is made in the shape of a pleading, its effect is governed, not by the date when it was prepared, but by that on which it was filed in court.

If a non-resident defendant, advised that a suit was about to be brought against him here, should employ his attorney and instruct him, when the suit was brought, to file a particular answer, surely the validity of the pleading, when filed to waive jurisdiction, would not be affected by the fact that the instructions had been given and the plea prepared before the suit. We think the instant case stands on the same footing.

In *Phipps vs. Snodgrass* it was held that Art. 162 "relates to cases where parties, by agreement, and with a view to a future suit, designate a place (other than defendant's domicile) in which to bring it."

Here, there is no allegation of any agreement whatever on the subject of the place where the suit should be brought, and it is not alleged, nor does it appear, that plaintiff even knew that New Orleans was not defendant's domicile, or used any influence or inducement to obtain his confession.

Judgment affirmed.

 No. 10,151.

MRS. BERTHA LEVY vs. JULIUS HITSCHÉ.

Under the law in force antecedent to the adoption of the present Constitution, courts of probate had jurisdiction of actions for the partition and settlement of community rights and property and in which the heirs and legal representatives of a deceased spouse seek to ascertain, establish and recover a share in the active mass of the community.

The Second District Court of the parish of Orleans, as it existed at that time, was vested with exclusive jurisdiction of *probate matters*, and consequently of suits for the partition of community property *in liquidation* and not in possession of major heirs, as the co-proprietors thereof.

40	500
48	565
40	500
51	1273
40	500
116	942

Levy vs Hiteche.

After the intent and meaning of a law has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the law as the text itself, and a change in the construction is the same in effect on contracts as an amendment of the law, by means of a legislative enactment.

A PPEAL from the Civil District Court, Parish of Orleans.
Tissot, J.

White & Saunders for Plaintiff and Appellee.

Henry P. Dart for Defendant and Appellant.

The opinion of the Court was delivered by

WATKINS, J. This is a suit to compel the defendant to accept title to a piece of real estate described in the petition, and to which he makes the following objections, viz:

First. That it is derived through certain partition proceedings had in the Second District Court of the parish of Orleans, wherein one succession obtained a decree against another, ordering a partition in kind; and that said court was without jurisdiction to entertain and decide it.

Second. That, to said partition proceedings, the universal legatees, nominated in the will of the deceased defendant, were necessary parties, and were not cited; or, if they were cited, no judgment by default was taken against them antecedent to the rendition of final judgment.

The case was submitted on an agreed statement of facts, and from an adverse judgment the defendant has appealed.

The pertinent facts disclosed by the record are as follows:

Ann Hugh and John Hugh were partners in community, and, at the death of the former, on the 4th of December, 1875, the assets thereof aggregated in value \$11,500.

On the 10th of December following her succession was opened in the Second District Court of the parish of Orleans; her will admitted to probate; an inventory—which consisted exclusively of an *undivided one-half interest* in the community property—was taken; and her testamentary executor qualified.

Her will bequeathed special legacies amounting to \$3,700, and bestowed the residuum of her estate on certain universal legatees, all of whom were minors.

Contemporaneously with the mortuary proceedings, John Hugh, the surviving partner in community, was interdicted by a judgment of the Second District Court, and a curator was appointed and qualified.

 Levy vs. Hitsche.

An inventory was taken of his share in the community property, as his only estate.

This consisted of about \$6000 worth of real estate and \$5000 of money, and rights and credits.

On the 4th of November, 1876, the curator brought suit in the Second District Court against Mrs. Hugh's executor for a partition of this community property.

On an exception of the executor to his capacity to stand in judgment alone, the curator filed a supplemental petition demanding that the special and universal legatees be cited. Some of them appeared and answered, but others did not.

Neither the record, or the court docket, shows that any judgment by default was entered in the case against those not answering.

Neither John Hugh or Ann Hugh left any forced heirs at the latter's death.

Judgment decreeing a partition in kind was rendered on the 11th of June, 1877; the proceedings had thereunder were regular and formal; and, in pursuance thereof, a partition of the effects of the community was made in presence of a notary.

In the partition in kind the allotment was as follows:

<i>a.</i> To the Interdict John McHugh, two pieces of real estate,	
\$2800 00 and \$1200 00.....	\$4,000 00
Money.....	1,997 64½
Total.....	
<i>b.</i> To the succession of Mrs. Ann McHugh, one piece of	
real estate	\$2,800 00
Bonds, etc.....	345 00
Money	2,852 64½
Total.....	

This partition was duly homologated and executed.

The interdict died in 1881, and his succession was opened in the Civil District Court.

The piece of real estate in contestation now was acquired by his estate while in charge of the curator; after his succession was opened it was sold under an order for its sale to pay debts; and from the proceeds of sale realized, his individual debts were paid, and, also, one of the debts of the community, which was for taxes of 1875—the year in which Ann Hugh died.

Levy vs. Hitsche.

After his debts were paid, nothing remained for distribution among his collateral heirs.

The property that was allotted to the succession of Ann Hugh, in the partition, was insufficient to discharge its debts and *special* legacies, and the latter prorated on the proceeds remaining in the hands of the executor. There was nothing applicable to the bequests in favor of the universal legatees.

I.

On this state of facts, the abstract legal question is raised, as to the lack of jurisdiction in the Second District Court, under the constitution and laws then in force, to entertain and decide that partition suit.

From 1854 to 1880 the Second Court of the parish of Orleans had exclusive cognizance of all probate proceedings therein. No change in the law took place, in this respect, under the Constitution of 1868. *Vide* Act 80 of 1869.

The reorganization of the district courts of the parish of Orleans, under the present constitution, resulted in the abolition of the Second District Court, and its jurisdiction and power were vested in the Civil District Court of said parish.

It is of first importance, therefore, to make an examination of the jurisprudence of that period, in connection with the articles of the codes conferring *probate* jurisdiction on the courts, in order to get a clear idea of the question in dispute.

The Code of Practice provides that "courts of probate shall have exclusive power * * * to ordain and regulate all partitions of successions in which minors, interdicted or absent persons are interested, or even those which were made by authority of law, between persons of lawful age and residing in the State, when such persons cannot agree upon the partition, and the mode of making it. Article 924, par. 14.

It also provides that "all partition of succession property shall be made by the court of probate of the place where the succession is opened. *Ib.* 1022.

These articles have been the subjects of frequent adjudications by our *early* predecessors, from which we have selected the following extracts :

In 7 N. S. 469, *Gosselin vs. Gosselin*, the court said: "By the Code of Practice article 924, paragraph 14, the court of probate has exclusive jurisdiction of *partitions*.

"This code was approved in 1824, and after its approbation, but be-

 Levy vs. Hitsche.

fore its promulgation, the Legislature, by an act of 1825 (p. 122, sec. 3), gave to the District Court jurisdiction of *suits* for partition. * * * Thus, the jurisdiction of the court of probates, which was *exclusive* in cases of partition, by the Code of Practice, was rendered *concurrent* only by the act of 1825, posterior to the approbation of the Code by the government, anterior to its promulgation."

In many subsequent decisions their successors maintained the *concurrent* jurisdiction of the *ordinary* and *probate* courts in partition *suits*, while *all* upheld the *exclusive* jurisdiction of the courts of probate, in all other respects. 3 N. S. 172, *Gauge vs. Gauge*; 6 La. 420, *Hooke vs. Hooke*; 2 Ann. 150, *Craighead vs. Hynes*.

This resulted in a line of demarcation being drawn between the character of partition suits which could be brought, in each respectively.

Hence, we have the provision of the Civil Code that actions for "partitions between *co-proprietors* of the same thing * * must be brought before the judge of the place where the *property to be divided is situated*," (R. C. C. 1290, 1304,) as contradistinguished from those of C. P. 1022, above quoted; but which did not interfere, in any wise, with those of C. P. 924, par. 14.

The adjustment of the jurisdiction of the ordinary and probate courts, in matter of partition, under those textual provisions, was attended with difficulty; but it was effectually accomplished, and the jurisprudence settled.

One of the questions on which most pungent discussions arose, during this process of adjustment, was whether or not an action for the partition of community property, between the survivor and the heirs of the deceased spouse, should be brought in a court of ordinary or probate jurisdiction.

In the case of *Babin vs. Nolan* it arose, and was decided; and, in the course of their argument, the court took occasion to review the jurisprudence, and pronounced their opinion in the following unmistakable terms:

This "is essentially an action for the settlement and partition of the community, in which the plaintiff, in the right of his sister, who was the defendant's late wife, seeks to ascertain, establish and recover the portion to which the deceased was entitled in the active mass of the community; and, ever since the decision of the court in *Turner vs. Collins* (1 U. S. 370), courts of probate have been repeatedly and uni-

Levy vs. Hitsche.

formly recognized in our own jurisprudence, to have jurisdiction, if not exclusive, at least concurrent with the district courts, in such cases.

"In the case of *Broussard vs. Broussard* (3 U. S. 37), which originated in a suit instituted by the heirs of the wife against the (surviving) husband, for the division of the community property, the *concurrent* jurisdiction was positively recognized. And so again it was decided in 3 N. S. 172; 7 N. S. 470; 9 La. 584." p. 278.

That principle has been affirmed in the following cases, viz: 17 La. 246, *Lawson vs. Ripley*; 1 R. 149, *Griffin vs. Waters*; 1 R. 512, *McCalloin vs. Palmer*; 23 Ann. 637, *Walker & Vaught vs. Kimbrough*.

It must be borne in mind, however, that those decisions do not impeach the authority that is conferred on probate courts by C. P. 924, par. 14, which has been considered, and treated, as vesting them with jurisdiction of "*partitions in which minors are interested*," independently of the property to be divided.

We find in *Craighead vs. Hynes*, 2 Ann. 150, a terse and forcible expression of this view, and which was expressed in the following terms, viz: "By Section 14 of Article 924 of the Code of Practice courts of probate had power 'to ordain and regulate all partitions of successions in which minors, interdicted or absent persons are interested; or even those which are made by the authority of law between persons of lawful age and residing in the State, when such persons cannot agree upon the partition, and the mode of making it.' By a subsequent act jurisdiction was given to the district courts.

"Our impression is that, under the latter clause of the above section, courts of probate have jurisdiction in cases of partition in which minors are concerned."

While, on the other hand, it has been frequently decided that, in case a succession has been fully administered by a testamentary executor, tutor, curator, or administrator, and the heirs, all of whom are majors, have come into the possession of the *residuum*, as an inheritance, or the same has been unconditionally accepted by them, the probate jurisdiction over the property ceases, and the co-proprietorship of such heirs supervenes. 4 R. 20, *Babin vs. Dodd*; 6 N. S. 519; 4 L. 202; 5 La. 384; 10 La. 18; 11 L. 359; 4 R. 412; 21 Ann. 364.

And particularly in the cases decided by our immediate predecessors, viz: *Woolfolk vs. Woolfolk*, 30 Ann. 139; and *Freret vs. Freret*, *Ib.* 506.

This lengthy and careful examination of adjudicated cases would not have been necessary but for the opinion expressed in the case of

Levy vs. Hitscha.

Boutté vs. Boutté, 30 Ann. 181, and that of *Buddecke vs. Buddecke*, 31 Ann. 572, in which a contrary doctrine was announced by the Court. The former is diametrically opposed to the theory announced in *Oraighead vs. Hynes*; and the latter is equally opposed to that in *Babin vs. Nolan*, quoted *supra*.

The facts in the *Boutté* case were that Charles and Francois owned in indivision a valuable property in this city. Charles died, leaving thirteen children; and, subsequently, Francois died, leaving a widow and thirteen children—some of the children of each being minors. The latter left a will, and the appointed executor qualified and took possession of his estate.

Nine of the heirs of Charles were the plaintiffs and the remaining four and the executor of Francois were the defendants in a suit in the Second District Court for the partition of that property. The question of the jurisdiction of the court was not raised by the counsel of either party, but the court, on its own motion, said:

"Here is not a succession to be settled, and property, exclusively its own, to be partitioned among the heirs of that succession. * * *

"The Second Court had not jurisdiction of the action, just as it is without jurisdiction of an action of partition between two individuals who are *majors*, and own property in common in their own right."

The heirs of neither decedent were in possession of the property as proprietors; the succession of one was under administration in the Second Court at the time; each decedent left minor children, and one a surviving widow, interested in the property which was the subject of adjudication.

The state of facts on which the opinion of the Court in the *Buddecke* case was predicated are that the matrimonial community existing between Christian T. Buddecke and his wife was dissolved by the death of the latter, the former and eleven children surviving, three of the latter being minors.

The deceased left a will which was probated in the Second Court. One of the major heirs of the deceased instituted suit against her father and brothers and sisters, in the Fifth Court, for a partition of the community, and it was ordered to be sold in order to effect a partition. When the title was subsequently tendered to the purchaser, he objected to it on the ground that the court had no jurisdiction to order the partition sale, and he was ruled to accept it. The Court said:

"We are surprised to learn that the decision (in *Boutté vs. Boutté*)

Levy vs. Hitache.

upset opinions of some of the profession on the matter of jurisdiction, upon which their practice had been based.

"That decision but followed the old and beaten path. Forty years ago the same rule was expressly laid down by this Court in a case which has been 'reported,' in the legal sense of that word, and from the reporter's statement of the facts, we know the whole history. *Henry vs. Krays*, 12 La. 214."

From a critical examination of those two opinions, it will appear that each stands alone, and is unsupported by *pertinent* authority.

In the former *no* opinion is cited, and in the latter only that in *Henry vs. Krays*.

In that case, suit was brought to annul a judgment of the district court, ordering a partition of property of a deceased sister between her surviving brother and sister, both of whom were of *full age* at the time.

It will appear that one of the determinative factors in that case was the claim made by the plaintiff in the partition suit to one-fourth interest in the property to be partitioned by virtue of a donation, and another was a claim set up by the defendant therein for a share of the same by virtue of a sale.

On the facts of that case the Court said, in regard to the jurisdiction: "The Court of Probates, on the contrary, can exercise no power not expressly given to it by statute, and is, therefore, of limited jurisdiction. By the Code of Practice, the authority of that court is exclusive to ordain and regulate partitions of successions, *even among persons of lawful age* and residing in the State, when they cannot agree upon the partition and the mode of making it. Under this grant of authority, this Court has thought that the Court of Probate might well act upon certain questions arising incidentally in the course of the partition, which would more properly belong to the ordinary jurisdiction, if presented separately, etc." * * *

But "the authority of the district court to ordain and regulate a partition of property, held in common by *other title than hereditary succession*, at the suit of the *co-proprietor*, can hardly be questioned at this time."

Instead of these views giving any support to the opinion expressed in the *Buddecke* case, in our conception, they are precisely in line with prior and subsequent adjudications herein cited by us.

The sole ground on which the Court sustained the jurisdiction of the district court was that as to the pretensions of the plaintiff based on a donation—she was a *stranger* to the succession, and not an heir.

Levy vs. Hitsche.

That was an appeal brought up from the first judicial district, outside of the parish of Orleans, and there was no minor or interdicted person interested in the property partitioned.

While we are at all times desirous of following the decisions of our predecessors, and feel ourselves instructed by their wisdom and learning, yet, in a situation like the present, we feel constrained to adhere to those decisions which were rendered during a *regime* in which the controversies they acted on were living and vital, and the court whose jurisdiction is questioned, was still in existence.

Indeed, the jurisprudence of that time constituted a rule of property on which titles to real estate were adjusted, and to disturb it now, that the court, on whose order the property was partitioned, had ceased to be, would be straining a legal technicality too far and to no useful purpose.

In a recent case this Court said :

“ A familiar rule is that judicial construction of statutes becomes incorporated in it.” *Hawkins & Roberts vs. Beer*, 37 Ann. 55.

In *Ohio Life Insurance Company vs. Debolt*, 16 Howard, 431, Chief Justice Taney, as the organ of the Court, said :

“ And the sound and true rule is, that if the contract, when made, was valid by the law of the State, as *then expounded* by all the departments of government and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent act of the Legislature of the State or decision of its courts altering the construction of the law.”

In the *Douglass vs. County of Pike*, 101 U. S. 677, the late Chief Justice Waite announced the same principle in even more perspicuous language :

“ The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights, that would be given to a legislative amendment; that is to say, make it prospective and not retroactive.

“ After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change in the decision is, to all intents and purposes, the same in effect on contracts as an amendment of the law by means of a legislative enactment.”

In *State vs. Thompson*, 10 Ann. 122, Mr. Justice Spofford stated the rule in this wise :

"Whatever might be our impression, were the matter *res integra*, we deem it important, in the construction of statutes, to adhere to what has already been adjudged. The judicial interpretation becomes, as it were, a part of the statute, and should not be changed but for the most cogent reasons."

We feel constrained to follow the jurisprudence as it was established by this Court, at a time when the Second Court was in existence, and to give a like interpretation to the law defining its jurisdiction.

It is not our purpose, nor do we deem it necessary, to any more specifically overrule the decisions in *Boutté vs. Boutté* and *Buddecke vs. Buddecke*. We simply decline to follow them because we think they are departures from the established jurisprudence, with reference to the jurisdiction of the Second Court in partition matters, and which jurisprudence constituted and is a rule of property that cannot be altered to the prejudice of titles which were adjusted and settled thereunder.

II.

With respect to the defendant's second ground of complaint—the absence from the record of the partition proceedings complained of, of a judgment by default—it is sufficient to say, that it appears, from the record, that the universal legatees of Mrs. Ann Hugh took nothing by the bequest, her succession proving inadequate to meet her debts and special legacies. It further appears that some of the legatees appeared and answered plaintiff's demands. We cannot regard this objection as serious. *Omnia rita acta* may well be applied to the action of the judge of the Second Court.

We are of the opinion that the judge *a quo* decided correctly.

Judgment affirmed.

40	509
116	508
116	509
40	509
118	573

No. 10,079.

R. F. HARRISON, RECEIVER, VS. CITY OF NEW ORLEANS.

Under the provisions of Act No. 16 of 1875, the city of New Orleans is required to pay certain officers and members of the Metropolitan police, and has no right to deduct disbursements from the taxes collected for that institution for the payment of such parties, for services rendered subsequent to the law.

The city of New Orleans is not liable for taxes collected for that force, by defaulting sheriffs, simply because it allowed them privileges for accelerating the payment of such and her own taxes from delinquents.

An expert appointed by a party to make researches deemed necessary for his defense, must be paid by that party.

A PPEAL from the Civil District Court, Parish of Orleans
Tissot, J.

Bayne, Denegre & Bayne and E. E. Moise for Plaintiff and Appellee.

W. H. Rogers, City Attorney, for Defendant and Appellant.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is a suit for the recovery of the amount of taxes collected by the city of New Orleans under the laws relative to the Board of Metropolitan Police for the years 1874, 1875 and 1876.

The defense admits the levy of the taxes, but avers that the amounts collected have been accounted for.

From a judgment for \$24,940 against her, the city appeals.

The plaintiff joins in the appeal, asking an increase of the judgment to \$40,512.46, with interest.

Two experts were appointed to examine the books of the city, and they made separate reports, agreeing, as far as the figures go, but disagreeing as to the credits which the city claims.

The plaintiff claims that for 1874, the city has collected the

sum of.....	\$539,273 18
and, after allowing a credit of.....	532,258 01

that he is entitled to the difference.....	\$7,015 17
--	------------

On the other hand, the city claims to be entitled to a credit for payment in excess of receipts, \$10,698 60.

The aggregate of those differences is \$17,713.17.

The city claims to have paid for the sanitary

police.....	\$16,402 54
-------------	-------------

and not to be liable for taxes collected by

Sheriff Gauthreaux, which she never re-

ceived.....	1,310 63
-------------	----------

\$17,713 17	\$17,713 17
-------------	-------------

For 1875, the plaintiff claims that the city has on hand....\$15,591 12

of that sum, the city's expert concedes.....\$12,186 95

but the city refuses to be held liable for the

difference, the same being for collections of

Sheriff Gauthreaux.....	3,404 17
-------------------------	----------

\$15,591 12	\$15,591 12
-------------	-------------

For 1876, the plaintiff charges the city with.....\$17,906 17

Harrison vs. City of New Orleans.

The city's expert concedes.....	\$12,752 55	
but the city declines liability for the difference, which consists of amounts collected: By		
Sheriff Gauthreaux.....	3,826 49	
Sheriff Wagaman.....	1,026 13	
and that the fund must be charged with fee of expert, to examine the books of the Board..	300 00	
	<hr/> \$17,906 17	<hr/> \$17,906 17

From this statement, it is apparent that the only questions to be decided are:

1. Is the city entitled to the credit of \$16,402.54 claimed to have been paid by her to the sanitary police.
2. Is the city to be held liable for the amounts collected and not paid over by the defaulting sheriffs, \$6,163.27.
3. Is the fund chargeable with the fee of the expert appointed by the city to examine the books of the Board, \$300.

I.

The bill presented by the city to show payment of the Metropolitan police, runs from August, 1875, to June 22d, 1876, and aggregates \$16,402.54.

Under the provisions of Act 16 of 1875, approved March 24 and promulgated April 4 of the same year, it was directed that the officers and members of the Metropolitan police force detailed permanently with the Board of Health and to each of the municipal courts, shall be paid by the city of New Orleans. This meant clearly, shall *not* be paid out of the Metropolitan police fund, but by the city out of other funds. There is nothing to show that of this amount, any part was expended for any liability anterior to the passage of the law.

II.

The next question is: Whether the city is liable for the amounts collected by the two defaulting sheriffs, and which never came to her hands.

The ground upon which the city is sought to be made responsible, is, that she constituted the sheriffs her agents, to collect by special contract, and that their delinquency is attributable to her.

The authority relied on in support of this position is the ruling in *Frank & Co. vs. Chaffe & Sons*, 34 Ann. 1203, in which sureties of a sheriff were released from liability, because he had acted as the agent of the litigants, under their consent, to sell some property attached.

Schulhoefer vs. City of New Orleans

The Court well held that, in doing so, he did not act as *sheriff*, and hence that the sureties could not be held.

The authority has no application to the facts of this case, which are simply that, in order to accelerate the collection of all back taxes, which, it would seem, were not actively prosecuted, for want of means in the city to pay the costs and expenses for so doing, the council passed an ordinance authorizing the sheriff, who had the writs in hand, to proceed *as such* with the execution of the same, and even to employ counsel and to defray the disbursements and collect the fees from the surplus—i. e., not out of the capital due for taxes. This they did in the line of official collection.

Under such circumstances, clearly the city cannot be held responsible.

III.

As to the item of \$300 for the expert employed for the examination of the books of the Board, it does not appear just that it should be charged to the plaintiff's account. The city is in no better condition, in that respect, than any other defendant. If she had researches to be made, she must pay those whom she entrusted with the duty. Had the plaintiff failed altogether, a question quite different might have been presented.

The district court allowed the amount reported by the city's expert, \$24,940.40; but without the interest, to which plaintiff is entitled.

By disallowing the two items for which the city claimed credit, \$16,402.54 and \$300, the amount of the judgment ought to be increased by \$6,004.54.

It is, therefore, ordered and decreed that the judgment appealed from be increased to thirty thousand nine hundred and forty-four dollars and ninety-four cents (\$30,944.94), with legal interest from judicial demand; and that, so amended, it be affirmed with costs.

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45 1408

No. 10,179.

GUSTAVE SCHULHOEFER VS. CITY OF NEW ORLEANS.

A judgment is a *flat* of a court settling the rights of the parties, and however unjust, erroneous or illegal the settlement may be, the parties can only claim under it that which, by its terms, the judgment awards.

Hence, the holder of a judgment against the city of New Orleans, which allows him interest from April 27, 1887, and who seeks to have his judgment funded into bonds under Act 67 of 1884, cannot claim or be allowed bonds bearing interest from June 1, 1884. No more interest can be allowed than fixed by the judgment.

A PPEAL from the Civil District Court for the Parish of Orleans.
Tissot, J.

White & Saunders for Plaintiff and Appellee.

W. H. Rogers, B. K. Miller and H. O. Miller for Defendant and Appellants.

The opinion of the Court was delivered by

POCHÉ, J. As the holder of certificates of indebtedness of the city of New Orleans for the current expenses of the city in the years 1874 to 1878, aggregating in amount \$3005, plaintiff brought suit thereon, and obtained judgment against the city for the full amount, with interest of 5 per cent per annum, from judicial demand, the 27th of April, 1887. That judgment became final on January 24, 1888. In March, 1888, he instituted proceedings to compel the board of liquidation of the city debt of New Orleans to fund his judgment into bonds in accordance with the provisions of Act No. 67 of the Legislature of 1884, said bonds to be equal in amount to the principal of his judgment, and to bear interest of 5 per cent per annum from June the 1st, 1884, as contemplated by that statute.

From a judgment in favor of plaintiff and in accordance with that prayer the city appeals, and her contention is that interest should have been made to run only from April 27, 1887, according to the very terms of the judgment sought to be funded.

The point is well taken and it must prevail.

Conceding, for the sake of the argument, that there was error in the judgment of January 24, 1888, in determining the date at which interest should begin to run, and that to comply with the provisions of Act No. 67 of 1884, the judgment should have allowed interest, as claimed by plaintiff in his first petition, to begin to run from the 1st of June, 1884, the record shows that the judgment became final on January 24, 1888, and in proceedings looking to its execution the court was powerless to enlarge its scope, or to otherwise amend or alter its effect, which is irrevocably fixed by its own terms. That proposition is self-evident under our laws, flowing from the very essence of all final judgments. A motion for a new trial or an appeal was the only remedy which the law tendered to plaintiff for the correction of the alleged error in the original judgment, and it is too late to attempt such a remedy on execution.

The question is not new in our jurisprudence, and the rule, already sanctioned by law and reason, finds additional support in authority.

Louisiana Savings Bank and Safe Deposit Company in Liquidation.

In the matter of the succession of Anderson, 33 Ann. 581, this court refused to allow interests to a creditor whose judgment was silent on the subject, even though the nature of his claim might have entitled him to interests.

The Court said: "A judgment has been defined to be the decision or sentence of the law, pronounced by a court of competent jurisdiction upon the matter contained in the record. * * *

"It is a *fiat* of a court settling the rights of the parties, and however unjust, erroneous or illegal the settlement may be, the parties can only claim under it that which, by the terms, the judgment awards." * *

"If the plaintiff in rule is holder of a judgment which unjustly denies to, and withholds from him, his legal right, it is a misfortune which might have been repaired before that judgment became final, but which is now past remedy."

The conclusions of the Court rested on and were completely justified by several previous adjudications enforcing similar views. *Saul vs. His Creditors*, 7 N. S. 437; *Cochran vs. Murphy*, 4 Ann. 6; *Succession of Regan*, 12 Ann. 116; see also *Villars vs. Faivre*, 36 Ann. 398.

In the instant case the special and sole relief sought by plaintiff is the funding of his judgment of January 24, 1888; by that judgment it was settled that his interest should run only from April 27, 1887, and he cannot now be heard, in his present proceedings, to claim more.

It is therefore ordered that the judgment appealed from be amended so as to fix the 27th of April, 1887, as the date from which interest is to run on the bonds to be issued to plaintiff, and that as thus amended said judgment be affirmed, costs of appeal to be taxed against plaintiff and appellee.

No. 10,076.

IN THE MATTER OF THE LOUISIANA SAVINGS BANK AND SAFE DEPOSIT COMPANY, IN LIQUIDATION.—ON OPPOSITION TO SECOND PROVISIONAL ACCOUNT.

Payments made by syndics, liquidators and other fiduciaries, under *ex parte* orders of a court, are still open to inquiry as to their correctness. The practice of granting such orders without notice to those interested and without proof contradictorily made, is, as a general rule, irregular and unwarranted.

But though unauthorized, such orders may be regarded as confirmatory of the good faith and honesty of those making the payments. And when the charges made are not extravagant, on their face, and were for services of experts, attorneys and others rendered under the eye of the court, and some of whom were appointed by the court without opposition, and the conduct and administration of the fiduciaries is free from

Louisiana Savings Bank and Safe Deposit Company in Liquidation.

suspicion of fraud, the payment will be viewed as *prima facie* correct, and in the absence of sufficient evidence to negative or rebut such presumption, the payments will not be rejected.

When an insolvent estate or banking institution is administered by three liquidators, whose commissions are fixed by law, they will not, in addition to such commissions, be authorized to charge a salary for their services. Nor will they be entitled to the assistance of clerks, unless they first show that from the intricacy of accounts, or other cause, the services of the clerks were a necessity, and obtain the authority of the court for their employment, when they have already the help of two experts in the work of liquidation.

The depositor becomes the ordinary creditor of the bank unless he makes a deposit in kind, as defined by the Code. Civil Code, Arts. 2940, 2943, 2944, 2945, 2963, 3522; 9 La. p. 50; 17 La. p. 162; 10 Ann. p. 342.

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

Blanc & Butler and *H. C. Miller* for John Crossley & Sons, Opponents and Appellants:

The liquidating commissioners of insolvent banks can claim no salaries, but are restricted to the commissions allowed by the law. R. S., Section 1818.

Nor can they subject the estate to pay salaries for clerks, save in exceptional cases, where the necessity exists, and then the charges must be reasonable, the theory of the law being that the commissioners must themselves render the necessary clerical services for which their commissions are compensation. 1 Ann. 21.

Experts are authorized to be appointed to state complicated accounts, not to instruct the court on the general issues of the case. If there are no accounts to be stated the estate cannot be subjected to pay expert fees. If there are such accounts, the fees must be proportioned to the labor requisite and performed by the experts. C. P., Arts. 433, 444.

Counsel fees incident to the liquidation of an insolvent bank must be proportioned to the services rendered, and to the result of the litigation in which the services are claimed to have been rendered. 12 Ann. 533.

The payment of debts of an insolvent estate or bank by liquidating commissioners must be on an account notified to creditors by advertisement, and after judgment of homologation. Payments of claims against insolvent estates in course of administration, made on *ex parte* orders, will not bind creditors unless sustained by proof. R. S., Section 1815; Civil Code, Arts. 1179, 1180, 1185, *et seq.*

The depositor becomes the ordinary creditor of the bank unless he makes a deposit in kind, as defined by the Code. Civil Code, Arts. 2940, 2943, 2944, 2945, 2963, 3522; 9 La. p. 50; 17 La. p. 162; 10 Ann. p. 342.

Horner & Lee for the Porter Heirs, Opponents and Appellants.

James B. Guthrie and *James D. Seguin* for Milton C. Randall, Opponent and Appellant.

W. S. Benedict and *Chas. S. Rice* for Appellee.

The opinion of the Court was delivered by

TODD, J. The Louisiana Savings Bank and Safe Deposit Company was placed in liquidation in June, 1879. On the 16th of June, 1887,

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the liquidators, or commissioners, filed their second provisional account.

This account exhibits assets as follows :

Dividend to commissioners by bank when they took charge.	\$ 43,171 70
Proceeds sale bank building.....	52,700 00
Received on account.....	6,870 00
Making total assets.....	\$102,821 70

The total charges on the account amount to \$81,197.

Oppositions were filed to the account by the heirs of Royal A. Porter, deceased, Milton C. Randall and John Crossley & Sons, and from adverse judgments these opponents have appealed.

I.

OPPOSITION OF THE PORTER HEIRS.

Upon the settlement of the succession of Royal A. Porter, the father of these opponents, their distributive shares were found to be in the aggregate of \$9866.15, which sum was deposited in the Louisiana National Bank to the credit of the succession of the decedent, subject to the control of the mother and natural tutrix of the heirs, then minors.

On the 12th of June, 1878, under an order of the Second District Court of New Orleans, this fund was withdrawn from the bank mentioned and deposited in the Louisiana Savings Bank, where it drew interest, which was paid to the tutrix.

On the 31st of May, 1879, an order of the same court was rendered, directing the withdrawal of said fund from the Savings Bank and the investment thereof by the tutrix in United States bonds.

On the 4th of June thereafter this order was presented to the president of the bank, who, after a short delay to ascertain the correctness of the order, informed the tutrix that no United States bonds could then be purchased in New Orleans, but that he would take the money and send it to Washington City and there purchase the bonds for the heirs. To this the tutrix agreed and surrendered her bank book and received two certificates of deposit—one for the shares of the two youngest heirs, and the other for the oldest, who had then been emancipated—accompanied by the assurance of the president of the bank that these certificates would be exchanged for the bonds as soon as they arrived, which, it was stated, would be about the 7th of July. The bonds never came; the investment was never made, in fact, and the bank failed—closing its doors on the 30th of June.

It possessed at the time, in cash, \$32,639 42, which went into the hands of the commissioners.

On the account of the commissioners, these heirs are placed thereon as ordinary creditors.

They claim, however, by reason of the facts recited above, that their deposit was a special deposit, entitling them to be paid by preference over all creditors. This is the sole question relating to this opposition to be determined.

The contention of the opponents rests entirely on the hypothesis that there was an actual deposit made on the 4th of June, 1879. The actual deposit was really made in June, 1878, and, in point of fact, from that time continuously the fund was in possession of the bank, after the proposed investment of the fund in bonds, as before.

From the time of the actual deposit of the money in June, 1878, the heirs or their tutrix were never in possession of the money.

There was an order of Court, it is true, requiring the fund to be invested in United States bonds, but the fund was not withdrawn for the purpose of this investment, and although there was a promise on the part of the president of the bank to make this investment, or purchase the bonds for the parties, it was never done by him, and the money remained in the bank as before. The issuing of the certificates, even coupled with the promise of the president to invest in the bonds and the purpose of the depositors to effect the investment, did not change the status or condition of the fund and convert the original irregular deposit of 1878 into a real or special deposit.

We cannot, under any reasonable view of the circumstances, construe this deposit as a real or special deposit as contended for by the opponents.

A deposit, as defined by the Code, "is an act by which a person receives the property of another, binding himself to preserve it, and return it in kind." C. C. Art. 2926.

"The depositary cannot make use of the thing deposited without the express or implied consent of the depositor." C. C. 2940.

The depositary ought to restore the precise object which he has received." C. C. 2944.

"The only real deposit is that where the depositary receives a thing to be preserved in kind, without the power of using it, and on the condition that he is to restore the identical object." C. C. 2963.

"He who deposits a thing in the hands of another, still remains the owner of it."

"Consequently his claim to it is preferred to that of the other cred-

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itors of the depositary, and he can demand the restitution of it * * * if the thing reclaimed be identically the same which he deposited." C. C. 3222.

The deposit thus specifically described in the foregoing articles is claimed by opponents to be the kind of deposit that was made by them in the Savings Bank, and upon this claim exclusively their case rests.

It will be seen that the essential condition of a deposit—a real or special deposit—is that the thing deposited can be identified.

In this case \$9866, in no particular or designated kind of money, was placed in the bank in June, 1878. In June, 1879, the bank failed, having in its vaults in money \$32,639.

That the fund deposited more than a year before could be identified and taken from these moneys found in the bank would certainly seem impossible, and even that any of this original fund remained and made part of this balance found was highly improbable.

Yet this identification is essential.

In the case of Longbottom's executors vs. Babcock, 9 L. 50, an opposing creditor to the executor's account claimed a privilege for or on account of a special deposit. We quote from the decision as follows:

"The evidence in the record shows that the deceased was the attorney in fact of Colton Henry during his (Henry's) absence from the State, and that before his departure he had given his agent (the deceased) a check on one of the banks for \$1300, to be disbursed on his account, and that \$1100 was found in the store of the deceased at the time of his death. But there is no evidence to show that this sum is the same money received by the testator. Art. 3189 (now 3222 C.C.) requires, in order that the depositor may exercise his right of privilege, proof of the identity of the thing deposited must be made. It is of the essence of deposits that the depositary should be bound to keep the thing deposited and restore it in kind to the depositor. In this case the money appears to have gone into the hands of Longbottom as the agent of Henry. He was bound to account for it, but not to restore it in kind. He did disburse a part of it for the use of his principal. The court properly rejected the claim as a privilege."

The case of Matthews, Finlay & Co. vs. their Creditors, 10 Ann. 342, is confirmatory and even more strongly illustrative of the same principle. We quote from that decision:

"The money was counted and debited to the depositaries simply as so much cash.

"Special or real deposits are usually sealed up, and not counted by the banker, and are to be returned in kind. * * * The box or package containing the real deposit is endorsed with the depositor's name, and is put away by itself in the vault, there to remain until demanded by the owner, and checks cannot be drawn against it."

In view of the above it is plain that the issuing of the certificates of deposit in this case cannot be regarded as changing in any wise the character of the deposit as contended for by opponent's counsel.

A certificate is given as evidence of the amount standing to the credit of the depositor. The main object of such certificate is to afford satisfactory evidence of such credit, and to enable the depositor to utilize the credit by drawing checks against or upon the amount so deposited, whereas it is seen from the authority last cited that if it be a special or real deposit, checks cannot be drawn upon it.

The counsel for opponents claim that the identification of the fund was sufficient, because the bank, when it failed, had in its possession cash exceeding in amount the deposit. We have before adverted to the extreme improbability that any part of this money was part or parcel of the funds originally deposited. But the authority of the case in 9th La., above cited, is, as we have seen, directly opposed to such contention.

It is true that authorities from other States were cited by the counsel of the opponents that undoubtedly supported their argument, and especially on this particular point, but they belong to a different system, and were the enunciations of equity courts relating to trusts, express or implied, and to trust funds. While they are authorities entitled to respect, we cannot yield to them in the face of the positive declarations of our written law, and the settled jurisprudence under it.

The claim was properly construed to be an ordinary debt of the bank, and the privilege rejected.

II.

The claim of Milton C. Randall is for services rendered the commissioners as an expert.

He was paid \$3000, but demanded \$7000 more, and appeals from a rejection of his demand.

It is strongly urged by the opponents of this claim that there was no necessity for this appointment. That the issues were such, that the services of an expert were not required. Were this a matter open to discussion, the necessity for the appointment of an expert might be reasonably questioned. He was, however, regularly appointed on the

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application of the commissioners, without opposition from any of the parties litigants. He rendered continuous services for a long time, but whether the character of those services, and the report made thereof, were strictly within the line or scope of his duties or appointment, it is at least too late to be made a subject of inquiry. The appointment must be considered as regularly and legally made.

We have attentively considered the character of the services rendered, their value to the parties, etc., and at present will content ourselves in saying that we are not convinced that \$3000, which the expert received, was an inadequate consideration for the services, and see no reason to disturb the conclusion of the judge *a quo*, who rejected the demand for further remuneration.

The consideration of this claim will occur again in the course of this opinion.

III.

The opponents, John Crossley & Sons, were mentioned in the account as creditors, but the amount owing them was stated therein as unknown.

1. By the judgment of the lower court, the amount of the indebtedness of the estate to them was fixed at \$41,714.11, with legal interest from the 10th of March, 1886, and the further sum of \$14,968.25, with legal interest from the 18th of May, 1886. These sums were in exact conformity to the decree of this Court, rendered on appeal in the case of Crossley & Sons vs. Louisiana Savings Bank, 38 Ann. 75. A larger amount was adjudged by that decree than was given by the judgment now under review, but by that decree a privilege for part of the debt was recognized in certain drainage warrants, and they were ordered to be sold and their proceeds applied as a credit on the debt. They were so sold, and the debt was reduced thereby to the sum or sums allowed by the judgment of the lower court in the instant case.

This adjustment of the debt was undoubtedly correct.

2. They opposed the charges imposed or sought to be imposed on the insolvent estate for salaries of the commissioners, hire of clerks, compensation to experts and fees of attorneys. Their opposition to these charges were all dismissed. As before stated, the entire sum for distribution amounted to \$102,321.70. The total charges on this fund for the administration of the insolvency, paid under orders of the court, amounted to \$69,000.

(a) The commissions of syndics on sums that came into their hands, as fixed by law, are 5 per cent on amounts up to \$50,000, 3 per cent on amounts not exceeding \$100,000, and 2 per cent on all sums

Louisiana Savings Bank and Safe Deposit Company in Liquidation.

above \$100,000. So that their entire commissions on \$102,321 would be \$4046, and no more.

There is charged as commissions on \$43,172, the amount first received by the commissioners from the officers of the bank, \$2158, and to this is added, "as received on salaries of commissioners," \$900 more, making in all \$3058. The charge for commissioners is a proper one, but there is no warrant in law for the additional amount charged on account of salaries, and this must be rejected.

(b) The charges for clerk hire amount to \$2000. It is to be noted that the entire fund for distribution, \$102,321, consisted of \$43,172, on hand when the bank failed; \$52,700, proceeds of sales of real estate, and \$6449, derived from collections. The creditors among whom this fund was to be distributed, and the respective sums owing them, was a matter of easy ascertainment, and the entire claims of all the creditors could probably have been listed from the bank's books. It seems to us that the three commissioners might have performed this work themselves, and the services of clerks dispensed with. The rule as to such allowances for clerks in cases like the present one, is thus properly declared in the case of *Pandelly vs. His Creditors*, 1 Ann., p. 21, quoting:

"The syndics receive a compensation for their services in the shape of a commission. Among the services the law expects them to render is the keeping of proper official accounts. Cases may arise in which extraordinary skill as an accountant might be required to unravel complicated accounts left in confusion by the insolvent, and in such cases, upon a distinct allegation by the syndics of the difficulties and necessities of the case, we are not prepared to say that the testimony in support of such allegations would be inadmissible. Such were not the allegations of the tableau."

The entire charge for clerks, under this authority, which we approve, should have been rejected. So far, in this instance, from it appearing in the statement submitted by the commissioners, that there was a necessity for the services of clerks, there was no mention made in court or petition for their employment, and no judicial authority obtained therefor.

(c) There was paid to Milton Randall, as before stated, \$3000, and it likewise appears that the further sum of \$1500 was paid Edwin Harris, another expert engaged during the administration of this insolvent estate.

The labors of the first named continued three or more years, and of the latter for at least six months.

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These parties were appointed by the court without opposition from the creditors or parties in interest, and it is too late to draw in question, as is sought to be done, the necessity or propriety of their appointment,

Opposition is, however, urged to the payments made them for their services.

An examination of the evidence in the record cannot fail to produce the conviction that the services rendered were exceedingly arduous and of great value, even if some of the labors of one of them—Mr. Randall—were misdirected as charged.

The liquidation of this insolvent institution has been attended by the most important and protracted litigation, in which the gravest issues were presented and the most intricate and complicated accounts, amounting to many hundred thousand dollars, were to be adjusted, and some of the most difficult questions and problems relating to banking and book-keeping were to be solved.

These labors were performed under the eye of the judge before whom the proceedings were pending, in which their services were rendered, and who approved the charges and granted express orders for their payment upon the application of the commissioners.

These orders of the judge approving the charges and directing their payment are, however, not to be considered as conclusive in favor of their correctness. On the contrary, as a rule, such orders should be reserved for, or rather confined to, approval of accounts contradictorily rendered, and after due notice and delays, such as are required for the due and regular homologation of accounts and tableaux.

These judicial orders, though irregular, are, however, confirmatory of the good faith of the commissioners in allowing the charges, and whose conduct during their entire administration is free from suspicion of fraud or dishonesty.

The payment of these charges fully comes under the rule so often announced in the decisions of this Court, that where payments are thus made by executors or other fiduciaries in the administration of estates, acting under oath, apparently in good faith, and not extravagant on their face, they are to be deemed and treated as *prima facie* correct. 2 U. S. 596; 6 U. S. 334; 3 R. 283; 6 Ann. 129.

We find in the record no evidence whatever to rebut this *prima facie* presumption in favor of the correctness of these items.

Under these circumstances, we cannot disturb the conclusion reached by the judge *a quo* in dismissing this opposition, whatever might be our opinion of the correctness of these charges, were the

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entire matter open to inquiry and the simple proposition presented for the first time, whether the commissioners should pay them in their entirety.

(d.) The fees allowed the several attorneys who were employed during the course of the administration of the insolvency were all opposed as excessive.

This opposition includes the fee of Chas. S. Rice for \$2000—\$1000 paid already—the fee of T. J. Semmes, \$2500, paid, and that of W. S. Benedict, for \$10,000, not paid.

In regard to Mr. Rice's fee, the attorneys for the opponent use the following language in their brief, respecting the same. Quoting :

“In view of Mr. Rice's services in placing the bank in liquidation, and other services detailed by him, the opponents would be content with the \$2000 charged for, if that is to be in full.”

In view of this admission and under the condition expressed, that it is a finality, the charge is approved.

The services were rendered by Mr. Semmes under a contract with the commissioners, in which the amount of his fee was fixed. This was approved by the Court and its payment made in compliance with its order.

As before stated, with reference to the litigation that has transpired during the progress of this liquidation, the amounts involved were very large, the question of law and fact very grave and complicated, demanding the highest professional skill for their determination, and imposing great responsibility, and we doubt not that the commissioners, in making the engagement with Mr. Semmes, were actuated by entire good faith.

For the reasons given with reference to the charges of the experts, we shall decline to disturb the ruling made by the court below with respect to this item.

The services of Mr. Benedict were engaged by the commissioners at the commencement of their administration, and the chief labor and responsibility has fallen upon him as the regular and principal attorney of the estate. They have been arduous in their character and the record shows faithfully performed and of great value. Had he been the only attorney who rendered services in the administration of this insolvency, and his fee the only one to be paid, we do not think the amount charged—\$10,000—for the valuable services rendered, would have been too much. But considering the assistance he has received from his able associates and the immense charges that this estate is

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burthened with, we think that \$6000 would be a reasonable and sufficient fee for Mr. Benedict.

This completes the review of all matters embraced in this obligation.

It is, therefore, ordered, adjudged and decreed that the judgment of the lower court, in so far as it dismisses the oppositions of John Crossley & Sons to the charges of the commissioners for salaries amounting to \$900, and to clerks' hire \$2000, it be reversed, and the oppositions in this respect be sustained and charges rejected.

That the judgment, in so far as it dismisses the opposition of the charge for fee of W. S. Benedict, it be amended by reducing the charge in fee from \$10,000 to \$6,000; and that, as thus amended, and in all other respects, the judgment be affirmed. The costs incurred by the oppositions of the Randall and the Porter heirs to be paid by them respectively in both courts, and those incurred by the opposition of John Crossley & Sons, be paid by the liquidation in both courts, reserving to the liquidation the right to recover from the parties whose claims were rejected or reduced the costs incurred by the opposition of the Crossleys to such items.

ON APPLICATION FOR REHEARING.

FENNER, J. We granted this rehearing solely on two points, viz:

1. The disallowance by our former decree of \$2000, placed upon the account as expenses of clerk hire.
2. The disallowance of \$900 compensation for special services of commissioners.

I.

A reference to our opinion in relation to this case, reported in 35th Annual, p. 196, will show that it presents very peculiar features, which need not now be further detailed. Suffice it to say, that these commissioners first selected by the stockholders and, on their request, appointed by the court, were placed in charge of the affairs of this large bank. These affairs were extensive and complicated. The case was not like an ordinary insolvency in which the insolvent is required to present a full statement of his affairs in the shape of elaborate schedules, setting forth the assets and liabilities with proper particularity and information as to all the items thereof.

In such a case the syndics, thereafter appointed, find in these schedules a proper basis for intelligent action, and have the right to exact from the insolvent all further necessary information.

But these commissioners had no such aids. They were bound to

State vs. Tiernan.

do for themselves what the ordinary insolvent would have been required to do at the outset—to ascertain the nature and extent of the assets and liabilities, and the relations of the bank generally to third persons, so as to elucidate and understand its affairs, and thus be enabled to liquidate them properly.

It is obvious that, under such circumstances, the aid of at least some of the clerical officers of the bank was absolutely essential, and that, without such aid, the commissioners must have been like a ship without a rudder.

It is, therefore, apparent, from the nature of things, that the retention and payment of such officers were proper and necessary, and finding that the charges now assailed were submitted to and approved by the court, and were actually paid under judicial order more than eight years ago, we conclude that we applied too strictly the rule laid down for ordinary syndics, and that the ruling of the district judge on this subject should have been left undisturbed.

II.

As to the allowance of \$900 to the commissioners for special services, we see no reason to change our former opinion. But as the payment has been actually made, as the present account is only provisional, and as it appears that a larger amount will properly come to them, as legitimate commissioners, on their final account, we will permit the present allowance to stand, with provision that it shall be credited to any future allowance for commissioners.

It is, therefore, ordered that our former decree herein be amended so as to affirm the judgment appealed from in so far as it rejected the oppositions to the charge for clerks' hire, and also to affirm it in so far as it rejected the opposition to the charge for salaries; provided, however, that said charge is to be deducted from any future allowance for commissioners; and that, as thus amended, it remain undisturbed.

No. 10,171.

STATE OF LOUISIANA VS. THOMAS TIERNAN.

A ruling of the trial judge cannot be reversed, unless the bill of exceptions makes such showing of the facts and circumstances as will enable this court to decide that he erred.

40	525
109	300
40	525
112	874

40	525
122	258

State vs. Tiernan.

A PPEAL from the Civil District Court for the Parish of Orleans.
Roman, J.

M. J. Cunningham, Attorney General, for the State.

Wm. L. Thompson for Defendant and Appellant.

The opinion of the Court was delivered by

FENNER, J. The record presents for our consideration a single bill of exceptions (others being waived) which recites that Thomas Howe, State's witness, testified "That he told McCarthy, the deceased, to come with me, that Tiernan was coming with a pistol, to which evidence or statement defendant objected because it was the mere opinion of the witness and as such not entitled to go to the jury as evidence; that the court overruled said objection," etc.

This is the entire bill as offered to the judge for signature, and its insufficiency, as failing to show in what way the statement was a mere opinion, is apparent.

The judge, however, in his reasons, states that defendant's objections were of an entirely different character as was also the evidence objected to. He gives the statement objected to as follows: The witness said "that having seen Tiernan's coat lying on a bucket in the bar-room, he inquired where Tiernan had gone to, when some one in the crowd said, 'here he is coming with a gun.' Witness then told McCarthy to come along with him. At that time the accused was coming down the street with something in his hand." The judge states that the grounds of defendant's objection were that the words spoken and repeated were hearsay and had not been uttered in the presence and within the hearing of the witness. The judge ruled that the words spoken formed part of the *res gesta* of the transaction then going on, and as such was admissible.

If we give the exception the benefit of the judge's reasons as part of his bill, nothing appears on the bill anywhere to show any error in the judge's ruling. For ought that appears to the contrary, the expression may have been strictly part of the *res gesta*, and we cannot reverse his ruling without clear showing of error.

Judgment affirmed.

Smith vs. Sellars & Co.

No. 10,074.

GEORGE SMITH VS. T. J. SELLARS & CO.

- A servant must be held to have accepted the service of his employer, subject to such reasonable risk as may be incidental to the character of the employment; and within that limitation he cannot be awarded damages for the occurrence of an accident, or resulting injury.
- An employee engaged in a hazardous enterprise cannot be required to give a laborer a positive guarantee against danger and injury which may be suffered from *accidental* and *fortuitous* causes.
- A servant, necessarily, assumes the risk *only* of such hazards as are apparently incidental to an employment intelligently undertaken; and if he be aware that proper precautions have not been taken for his safety, and still continues the service, notwithstanding the risk, he will be considered as having assumed the responsibility of his own security.

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

Harry H. Hall for Plaintiff and Appellee:

I.

The master will be held liable for subjecting the servant, through negligence, to greater risks than those which properly belong to the employment. Thompson, Negligence, II, 969; Hilliard, II, pp. 424, 456, 459, 467; Addison, Torts, I, pp. 226, 257; Wharton, Negligence, § 205; Beach, Contrib. Neg. 311; Wood, Master and Servant, 478, 843; Wait, IV, p. 417; 102 Mass. 572; 55 Ill. 492; 8 Am. Rep. 661; 31 Ind. 175; 62 Mo. 239; 63 Penn. St. 146; 34 N. J. L. 151.

II.

A servant assumes only the risks ordinarily incident to the business. Wood, Master and Servant, pp. 738, 739, 672, 681, 763; Wharton, Negligence, § 199; Beach, Contrib. Neg., 370; McAnley vs. Brownlee, 32 Jur. (sc.) 415; Mason vs. Edison, 28 Fed. R. p. 228; 32 Iowa, 357; Pool vs. R. R., 56 Wis. 227; Alexander vs. Tennessee, 3 Pacif. R. p. 735; V. 48 Wis. 375; Patterson vs. Pittsburg, 76 Penn. St. p. 393; Cook vs. St. Paul, 24 N. W. Rep. 311.

III.

The servant has a right to rely upon the superior judgment and knowledge of the master. Wood, Master and Servant, pp. 749, 751, 677; Thompson, Negligence, II, p. 975; Wait, IV, 417; do. do.; 41 Barb. 366; Wharton, Negligence, § 215.

IV.

When the master delegates his duty to another person, he is liable for that person's negligence. Woods, Master and Servant, pp. 871-873; 81 N. Y. 521; 37 Am. Rep. 521; 84 N. Y. 77; 31 O. 287; 27 Am. R. 510; 11 Mass. 245; 11 R. I. 152; 49 N. Y. 521; 53 Id. 551; 2 Laws (N. Y.) 506; 59 N. Y. 517; 38 Wis. 289; 78 Penn. St. 26; 17 Wall. 553; 28 Barb. 60; 20 O. 415; 62 Mo. 373; 14 Am. R. 424; 47 Mo. 567; 4 Am. Rep. 353; 100 U. S. 213; Wood's Master and Servant, pp. 883, 885; 2 O. 415; 3 O. 201; 31 O. 287, 292; 2 Duv. 114; Wharton, Neg., § 232; Reising vs. Steinway, 5 N. E. R. 449; Wharton, Negligence, § 235; Thompson, Negligence, II, p. 1030; Beach on Cont. Neg. note, p. 331.

V.

One to whom the master delegates the performance of his duties, as master, is not a fellow servant of those over whom he exercises those duties. 3 Wait, Act. and Deft., p. 415; 61 Mo. 492; 62 Mo. 326; 38 Wis. 289; v. note; 21 Am. Rep. 579, 582; 76 N. C. 5; Beach,

40	527
44	96
40	527
50	195
50	728
40	527
52	1132
40	527
107	486
40	527
108	80
40	527
120	595

Smith vs. Sellars & Co.

pp. 331, 334, 389; Thompson, Negligence, II p. 1028, *et seq.* 1030; Wait, Act. and Def., 4, p. 415; Beach, Contrib. Neg., p. 334; 61 Mo. p. 495; 26 Ind. 74; 76 Penn. St. 389; 49 N. Y. 672; 45 Md. 229; 44 Md. 283; English cases cited at p. 335 of Beach; Gormly vs. Vulcan. 61 Mo. p. 494; 47 Mo. 567; 59 Mo. 495; 62 Mo. 337; 198 Mo. 289; 78 Penn. St. 25; Wait, A. and D. 8, p. 297; 50 Mich. 179; 45 Am. R. 35; 41 do. 812; 80 Ind. 281; Shearman & Redfield on Negligence, § 102; Wharton on Negligence, § 222; 53 N. Y. p. 55; 53 N. Y. p. 527; Ryan vs. Baggelley, 50 Mich. 180.

VI.

The burden of proof of contributory negligence is, in such cases, upon the defendant. 15 Wall. 401; 93 U. S. 291; Wood, Master and Servant, p. 777; 29 Iowa, 14; 4 Am. R. 181.

VII.

When the jury has failed to do justice the court, in the exercise of its jurisdiction, must do it, and will increase the verdict. Sullivan vs. R. R., 39 Ann. 800.

VIII.

A verdict for \$10,000 for loss of boy's arm is not excessive and will not be disturbed on appeal. Ketchum vs. R. R., 38 Ann. 777.

Charles S. Rice for Defendants and Appellants:

1. The petition shows no cause of action.
2. The petition charges only a fortuitous accident, or one incidental to the employment; and shows no relation between the alleged cause of the accident and the accident itself.
3. The servant takes upon himself all risks incident to his employment. He has no right to dictate to his employee how he shall conduct his business. If he does not like the manner in which it is conducted, he may remain or quit. If he remains, without promise of remedy, he does so voluntarily and at his own risk. The servant is not "a subject to the will of the master" in such wise that he is compelled or coerced.
4. The evidence justifies defendant's foreman in refusing plaintiff's demand, for reasons assigned by him at the time. It shows that the accident was purely fortuitous; that plaintiff was not injured by anything that either he or the defendant had anticipated, or could reasonably have anticipated; that every precaution was used and care exercised by defendant's foreman that a careful and prudent man would exercise; and negligence in no respect is imputed to him, in the falling of the joist, by plaintiff, or any of his witnesses.

The opinion of the Court was delivered by

WATKINS, J. Plaintiff claims ten thousand dollars damages for injuries inflicted, at the hands of the defendants, under the following circumstances:

That on or about the 12th of July, 1886, he was employed by the defendant as a laborer to assist in the demolition of the Exposition buildings, in this city, and, while thus engaged, he was injured by a falling joist.

That shortly prior to receiving the injury, "in order to protect himself from possible danger at the derrick, to which post he had been assigned by defendant's foreman, he rove the line of the fall entrusted to his care, through a block fastened to the derrick platform, thus per-

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mitting him to effectively perform his duty, at a safe distance from the derrick; that, arbitrarily, unreasonably and unlawfully, the foreman of the defendant ordered him to remove said block, and would not permit him to work in a place of safety; and that he was subjected by the defendant to the authority of said foreman, their agent, and was compelled to obey him; and that in consequence, *solely* of the said unlawful acts of defendant and their aforesaid agent," he received the injury complained of.

"That the danger which alone could have or was seen by him, in his employment, was the breaking or falling of timbers swung to the derrick, and being lowered; that the *joist* that fell and injured him was *not* swung, but would not have struck him had he been permitted to use the block, as above set out."

In limine the defendant tendered the plea of "no cause of action," and it was overruled, and we think incorrectly.

The danger against which the plaintiff *sought* to guard himself, by reaving the line of the fall through a block attached to the derrick platform, "was the breaking, or falling of timbers *swung to the derrick and being lowered*," and not the falling of "the *joist*" that was *not* so swung, or being lowered.

The unlawful act of the defendant that is assigned, is that of its foreman in refusing to permit him to "perform his duty at a safe distance from the derrick," in the manner stated above.

There is no charge that the falling of the joist was apprehended, and danger from that cause foreseen, by either the plaintiff or the defendant's manager. On the contrary, the petition contains the distinct averment "that the danger which *alone* could have been or was foreseen by him, in his employment, was the *breaking or falling of timbers swung to the derrick and being lowered*."

The dangers from a falling joist was unforeseen, and not anticipated by either.

There is no charge that the falling of the joist was occasioned through the fault or negligence of the defendant, its servants, or agents. It is not averred that the falling of the joist should have been foreseen and provided against by the defendant and its managers.

From the allegations of the petition we take it that the falling of the joist was the result of an accident; and it may have been caused by some latent defect in the *construction* of the building. This was a danger entirely independent of that which might have threatened the plaintiff by the falling or breaking of timbers swung to the derrick.

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The falling of the joist seems to have been altogether fortuitous. The place where the plaintiff was directed by the foreman to stand was not alleged to have been more within the compass or area of falling joists than that he had chosen as a place of safety from "breaking or falling timbers swung to the derrick." *Non constat* that had he occupied that position, unrestrained by the defendant, or his foreman, that, or a similar accident, would not have happened.

The defendant must be held as innocent of the cause of the danger, and cannot be made responsible for the injury sustained.

The defendant's counsel propounds the following query, viz.:

"In other words, let us suppose that there was reason to fear that timbers swung to the derrick would break or fall, and thus threaten danger to those working near the platform; that the plaintiff was refused the safeguards from *that* danger, as he alleges, but remained under such refusal at the place of supposed danger. Are the defendants liable to him because of some other danger that was not foreseen by him or by them, and for which neither knowledge, nor culpable ignorance, nor negligence in them is charged?"

We are of the opinion that they are not.

A servant must be held to have accepted the service of his employer, subject to such reasonable risk as may be incidental to the character of the employment; and, within that limitation, he cannot be awarded damages for the occurrence of accident, and resulting injury. An employer, engaged in a hazardous enterprise like that of the demolition of the Exposition buildings, could not be required to give to every laborer a positive guarantee against danger, and immunity against injury, which might be suffered from *accidental* and *fortuitous* causes, over which he could exercise no control, and of the likelihood of which he could have entertained no apprehension at the time the contract of employment was entered into, or previous to the happening of the accident occasioning injury.

It has been well said by a distinguished author that "it has often been justly remarked that a man may decline any exceptionally dangerous employment; but, if he voluntarily engages in it, he should not complain because it *is* dangerous." Cooley on Torts, p. 555.

The servant assumes the risk only of such hazards as are apparently incidental to an employment, intelligently undertaken; and, if he is aware that proper precautions have not been taken for his safety, and still continues the service, notwithstanding the risk, he will be considered as having assumed the responsibility of his own security. *Leary vs. Boston and Albany R. R. Co.*, 139 Mass. 584; *Sullivan vs.*

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India Manufacturing Co., 113 Mass. 396; Coombs vs. New Bedford Cordage Co., 112 Mass. 572; Wood on Master and Servant, p. 809.

The falling of a joist cannot, in this instance, be considered as a latent or extraordinary danger, not reasonably contemplated in the plaintiff's employment.

We are of the opinion that the defendant was not responsible for the accident, or the injury; and that plaintiff's petition does not state a cause of action against him.

It is therefore ordered, adjudged and decreed that the verdict of the jury, and the judgment thereon based be set aside, annulled and reversed, and that the plaintiff's and appellee's demands be rejected at his cost in both courts.

No. 10,159.

SUCCESSION OF JOHN T. MOORE.

Forced heirs have an action in reduction of excessive donations, which extends not only against co-heirs, but even against strangers. It includes a spouse.

The usufruct which the law allows to the surviving spouse, over the share of the deceased in the property of the community, during widowhood, when there exists issue of the marriage, is not defeated by testamentary dispositions of the deceased, bequeathing the disposable portion to the survivor and the usufruct over his undisposed share of the community property.

Such usufruct can be defeated only where the predeceased has, by will, disposed of his share in whole, or in part, *adversely* to the usufruct, so that both, the usufruct and the bequest, cannot co-exist.

Bonds payable to bearer, and title to which is transmissible without indorsement or assignment, but by simple delivery, may be the objects of a manual gift, and are not required to be donated by authentic act. This sort of donation is subject to no formality.

Property donated must be appraised at its value, at the death of its donor, and fictitiously added to the property owned by him, at his death, in order to ascertain the disposable portion.

Excessive donations are not null, but reducible.

Donations, in excess of the disposable portion, produce no effect, for the surplus.

When the property donated is less in value than the disposable portion and that portion has been bequeathed to the donee, the latter is entitled to the difference from the estate of the testator.

A husband may give to his first wife that which he can to a stranger, but not more. In case of an excessive donation to her, the donation may be reduced at the instance of the forced heirs, whose *legitime* has been encroached upon, but only to make it good.

A PPEAL from the Civil District Court, Parish of Orleans.
Tissot, J.

Robert G. Dugue for Mrs. Julia Moore and the Minor Hickey,
Plaintiffs and Appellees:

All donations, whether made in or out of the State, are to be considered in determining the reduction to which they are liable, and must be fictitiously added to the property belonging to the donor at his death. C. C. 1505.

40	531
47	733
40	531
52	1879
40	531
105	712
40	531
112	434
40	531
1118	217

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Only those are excluded which have perished by accident in the hands of the donee. C. C. 1506.

In calculating the disposable portion, the property given or bequeathed to all persons whether relations or strangers, must be included. C. C. 1234.

A donation *omnium bonorum* is null for the whole. C. C. 1497.

One must have a domicile somewhere. Domicile once acquired continues until another is obtained, and the burden of proving the change is on him who asserts it.

Both the fact of abode and intention of remaining indefinitely are necessary to establish a new domicile. The fact of abandoning a place in search of another place, without that place being determined upon, and occupied or inhabited as a residence or domicile, does not operate an abandonment of the first domicile. 31 Barb. 479; 53 N. Y. 568.

The allegation of domicile in a bill in chancery, standing alone, is not decisive. Ibid.

There is no proof of the donations made in New York.

If they were made, they were simulated and fraudulent, and were invalid in form. 22 Ann. 97; 12 R. 76; C. C. 1536, 1538.

If valid, they were revoked tacitly. C. C. 1749; 26 Ann. 449, 195; 5 Toullier, §§ 912, 914. 923; 23 Demolombe, § 402; 15 Laurent, §§ 332, 333; Aubry & Rau, p. 115; 4 Troplong, Donations, § 2667.

All that is acquired during the existence of the community is presumed to belong to it, and everything found in the possession of the survivor is presumed to belong to the community until the contrary is shown. C. C. 2334, 2402, 2404, 2405; 16 Ann. 209; 37 Ann. 104.

In a testate succession composed solely of community property, a bequest of the disposable portion by the predeceased spouse deprives the survivor of the usufruct of the *légitime* of the forced heirs. Forstall vs. Forstall, 28 Ann. 198; Denégre vs. Denégre, Opn. Bk. 45, fol. 529; 33 Ann. 1; 32 Ann. 1218; 26 Ann. 198; 33 Ann. 55; 13 Ann. 424; 12 Ann. 646.

The *légitime* cannot be impaired. C. C. 1710; 3 L. 9; 32 Ann. 1218.

The legacy must be accepted or renounced for the whole. C. C. 986, 1016.

Singleton, Brown & Choate and *H. D. Ogden* for *T. A. Flanagan*, Tutor, Intervenor.

T. J. Semmes & Legendre and *W. B. Lancaster* for *Widow A. J. Moore*, Defendant and Appellant :

1. The motive which influences a party to change his domicile is immaterial if the intention is real. 138 Mass. 372; 5 Mason, 70; 117 U. S. 123.
2. The intention to remain in a place for an indefinite time suffices to acquire there a domicile. 8 Cranch, 279; 33 Ann. 137; Landis vs. Walker, 15 Ann. 213.
3. Although the party removing to that place may have a floating intention at some time to return. Story Conflicting Laws, Sec. 46; Whart. Conf. L., Sec. 22 (n); Lawrence's Com. on Wheat., Vol. III, p. 98.
4. The decision in 28 Ann. 198, *Forstall vs. Forstall*, is erroneous. The surviving spouse is entitled to the usufruct of any portion of the deceased's share of the community property not disposed of by will, and which the issue of the marriage may inherit. The share of the deceased in the community property is totally distinct from the disposable portion of the estate; the act of 1844 intended to burden any part of the community property inherited by the issue of the marriage with the usufruct of the surviving spouse, even though such community property constitute the *légitime* of the children in whole or in part.
5. Gifts from husband to wife, during marriage, are valid by the law of New York, and are upheld in equity without the intervention of a trustee wherever the common law

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- prevails. Equity has always disregarded the oneness of the spouses at common law, and like civil law treated married persons as two. 88 N. Y. 302; 96 N. Y. 540; 36 N. Y. 412; 48 N. Y. 216.
6. In common law States, a delivery, with intent to transfer title to a chose in action, or note, or bond, or certificate of deposit, unindorsed, is a good gift; *a fortiori*, a gift of government bonds, payable to bearer is good on delivery with intent to give. Hackney vs. Vroman, 62 Bar. 668; 1 Bailey (S. C.), 117; 13 Gray, 418; 55 N. Y. 68; 36 N. Y. 340; 107 U. S. 611.
 7. If a husband expresses intent to give, subsequent possession is presumption that gift was made. 62 Barb. 668; 1 Bailey (S. C.), 117.
 8. If a man take a note in name of his wife on sale of his property, it is presumptive evidence of a gift. Richardson vs. Livery, 67 Mo. 411.
 9. Donations, valid by the law of the place where made, are not affected by subsequent change of domicile. 36 Conn. 160; 12 Ann. 607.
 10. If the domicile of Mr. Moore was in New York at the time of the donations made to his wife there, such donations are not subject to reduction under the law of Louisiana, although at the time of death he was domiciled in Louisiana. Wharton's Conf. of L., Sec. 202.
 11. But the validity of a gift is to be determined by the law of the place where made, irrespective of the domicile of the parties. Emery vs. Clough, 63 N. H. 532; Giday vs. Moore, 86 N. C. 484.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The object of this suit is to have it judicially declared :

1. That the widow of the deceased is not entitled to a usufruct over his share in the community property.

2. That the donations of securities and cash made by the deceased to his wife, in New York and New Orleans, are nullities, and if not such, are excessive, and should be reduced to the *legal quantum*.

3. That the deceased left individual property, which he owned previous to his marriage, and which must be accounted for.

The defense is, that the deceased, by his will, confirmed the usufruct given by law to his widow and has bequeathed to her the disposable portion of his estate; that the donations attacked are valid as having been made in New York during the existence of the domicile of the couple in that State and agreeably to the local law.

There was judgment recognizing the succession as a creditor of the community for \$7000, the widow as a creditor for \$2000; that Moore never acquired a domicile in New York; that the donations are simulated; that the effects donated should be inventoried; that the widow is entitled to the disposable portion and the plaintiffs to the share accruing to them as forced heirs, in that portion of his estate of which the law prohibits him from disposing.

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From this judgment the widow prosecuted this appeal. The appellees have prayed for no amendment.

Three questions are therefore presented :

1. What are, in the eye of the law, the testamentary dispositions of the deceased and what is practically their extent.
2. Whether the donations made in New York are or not valid.
3. Whether the succession is a creditor or not of the community.

John T. Moore died in this city on March 29th, 1886.

He left a surviving wife, seven children and two sets of grandchildren representing their deceased mothers.

He executed a will on October 20th, 1885, which was followed by a codicil dated February, 1886.

The will contains the following clause :

“All the property I am possessed of, consists of community property. I give, devise and bequeath unto my wife, Agnes Jane Byrne Moore, the usufruct during her natural life, of all the property I may die possessed of, community or no community. I hereby appoint my said wife executrix of this my last will and testament, with seizin of my entire estate, and without any bond or security whatever and without an inventory of my estate.”

The codicil contains two special legacies, amounting to ten thousand dollars, and the following clause :

“I give and bequeath unto my said wife, Mrs. Agnes Jane Byrne Moore, the disposable portion of all the property, real and personal, movable and immovable, in whatsoever the same consist and wherever situated, I may own or possess at the time of my death, and to that end I constitute my said wife my universal heir and legatee.

“I do hereby declare that this is a codicil to the last will and testament, already referred to as having been made by me by act before W. J. Castell, late a notary public in this city, on 20th October, 1885, which said last will and testament shall be and remain in full force and effect.”

I.

These clauses must be taken and construed together in order to ascertain what the intention of the testator was.

A careful consideration of them impresses the mind that his main object was to give to his wife all that the law allowed him to dispose in her favor.

The first expresses the wish that she should have the usufruct

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during life of all his property, and he next bequeaths to her the disposable portion of that property, constituting her to that end his universal legatee.

The plaintiffs contend that, under the terms of the act of 1844, now Article 916 R. C. C., and under Article 1710 R. C. C., the widow cannot claim *both* the disposable portion and the usufruct.

Article 916 reads :

" In all cases, when the predeceased husband or wife shall have left issue of the marriage with the survivor, and shall not have disposed, by last will or testament, of his or her share in the community property, the survivor shall hold in usufruct during his or her natural life so much of the share of the deceased in such community property as may be inherited by such issue. This usufruct shall cease, whenever the survivor shall enter into a second marriage."

This is a reproduction of the second section of the act of 1844, p. 99 : R. S. 1711.

Article 1710 justifies an action to revoke charges or conditions illegally imposed by a testator on the legitimate portion of forced heirs, and is a reproduction of Article 1703 of the Code of 1825.

The purpose of the law was obviously to enlarge the rights of the surviving spouse by conferring on him or her, privileges not previously possessed.

Under anterior laws, such spouse was entitled to take only his share of the community property, and had no claim whatever over the portion accruing to the issue of his marriage with the deceased, as his share therein.

Since the passage of the law, the surviving spouse has, *virtute legis*, a right of usufruct over the share of the deceased in the community property inherited by the issue of the marriage whenever the deceased has not, by a testamentary disposition, provided to the contrary.

The usufruct, under the provision of the law, continues during the widowhood of the survivor, when there exists issue of the marriage and no will to the reverse.

The law did not propose, by allowing the usufruct, to abridge any of the rights of the first dying spouse. On the contrary, it left it within his power, his discretion, even his caprice, to place his share in the community property in the condition in which it would have been in, had not the law of 1844 been passed, as, it provides that the usufruct will accrue to the survivor, *if* the deceased has not disposed, by will, of his share, inherited by the issue of his marriage.

The spirit and the letter of that portion of the law are simply, that

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the surviving spouse shall have, during widowhood, the usufruct of the share of the deceased in the property of the community, there being issue of the marriage, when the deceased shall not, by will, have disposed of his entire share in the property, so as to defeat the legal usufruct over the whole; clearly implying, that, when the deceased shall have, in that mode, disposed of a part of his share, the usufruct created by law, should extend only over the portion inherited by the issue of the marriage, due regard had to their *légitime*.

At Moore's death, his widow was clearly entitled to her half of the community property, and, in the absence of any will to the contrary, she would also have been entitled to a usufruct during her widowhood, over the remaining half, that is the share of her husband therein inherited by the issue of the marriage. *In honorem preteriti matrimonii*. *A fortiori*, would she be entitled to such usufruct, when, there being a will, it provides that she shall have it.

Surely, as the law did not design to curtail any of his rights over his property, which he possessed previous to the law, Moore could have bequeathed the *naked* ownership of the disposable portion in favor of any stranger, for, under the previous laws, he could have disposed of that portion of his estate even unqualifiedly, such ownership to become eventually *full* ownership, at the termination of the usufruct.

His widow, in the case just stated, would have had a usufruct over the entire share, as well that portion bequeathed to the stranger, as that inherited by his issue, the legatee taking nothing beyond the naked ownership of one-third, and the issue that of two-thirds.

There would even be no objection to his bequeathing the disposable portion, without any restriction, including both ownership and usufruct, to a stranger, leaving the other two-thirds to accrue in naked ownership to his forced heirs as the maximum of their *légitime*, but subject to the usufruct of his widow.

What he could do in favor of a stranger, he could validly do in favor of his wife.

Who can do more, can do less.

It is apparent, that the only condition imposed by law for the existence of the usufruct in favor of the survivor, is that the deceased shall not have disposed by will, *adversely*, of his share in the community.

As a consequence, it follows that where the adverse disposition affects only *part* of the share, the usufruct shall not extend over the disposed portion, but shall exist over the undisposed portion, inherited by the issue of the marriage.

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Disposing of *the share* means disposing of the *entire* share.

To dispose of *part* of the share is not, to dispose of the *entire share*, is not to dispose of *the share*.

It is true that Moore could not encumber the portion for which his children are forced heirs, that is their *légitime*; but the fact is that he has not done *so*, for the encumbrance is placed upon it by *law*, independent of his participation.

All Moore did was to confirm it. It would have existed without the confirmation, which is practically a superfluity.

The words used for the confirmation and which apparently are expressive of a bequest, are of little or no significance, for the plain reason, that, without such confirmation, the widow would have had the usufruct by the force of the law, and could have been deprived of it only by an adverse testamentary disposition of her husband.

The contention of the plaintiffs is that: "Where there is a will, which diverts from the issue the disposable part of the community property—which the issue would otherwise inherit—and so the issue does not inherit the whole, the usufruct does not attach."

This proposition is untenable and rests upon the inadmissible theory that disposing of a *part*, is disposing of the *whole* of the thing.

In support of this view, counsel relies on the decisions of a previous Court in two cases, that of the Succession of Forstall, 28 Ann. 198, and of the Succession of Denegre, unreported. O. B. 45, fol. 529; also Grayson vs Sanford, 12 Ann. 646.

The terms of the wills of Forstall and of Moore are not germane. The facts are different. The ruling, therefore, cannot be invoked as a precedent.

The opinion shows that Forstall had disposed of his entire share in the community in favor of his wife, while in the instant case, Moore has bequeathed to his wife only the disposable portion, confirming her legal usufruct over the remaining portion of his share in the community property, without affecting or attempting to encumber, in the least, the ownership of the two-thirds inherited by the issue.

The court used the following language:

"The condition upon which the survivor shall have the usufruct is that the predeceased husband or wife shall not have disposed of his or her share; that is, the share that he or she was permitted by law to dispose of."

A thoughtful reading of the text of the law and consideration of its spirit and purpose, shows that the disposition which is referred to as destructive of the usufruct, is not one *in favor of*, but one *adverse to*,

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the survivor, one which actually takes away from him, in unmistakable terms, the usufruct, in whole or in part.

Hence, where the deceased spouse, leaving issue of the marriage, and owning separate and common property, bequeaths to the survivor the disposable portion and the usufruct of his undisposed share in the community property, the disposition is valid and binding on the heirs inheriting the undisposed portion, and the same is true where he institutes the survivor his universal legatee, for, the bequest is not null, but reducible to the disposable portion and the usufruct over the undisposed share. R. C. C. 1502.

In the succession of Denegre, subsequently decided, it was held by a divided court that, as the testator had bequeathed \$10,000 to one of his daughters and directed that the rest of his property be *administered* for the benefit of his widow and children, he had disposed of his share in the community and that his widow was not entitled to the usufruct.

The error consists, not so much in the construction of the law, as in the interpretation placed on the will, for it is clear that, if after making the legacy, the testator had provided that his estate should, at his death, pass to his heirs, the decision would have been correct.

Such was the condition of things presented in the Succession of Schiller, 33 Ann. 1, in which the testator had willed that his estate be *distributed* among his legal heirs, according to the laws in force in the State. The word distribution implying a division, and, therefore, a partition, the present Court held that the widow is not entitled to the usufruct which she claimed.

The facts in the Grayson case, 12 Ann. 646, are not analogous to those here. The widow did not claim *both* the disposable portion and the usufruct, and the Court did not say that she could not have *both*. The matter under consideration was the interpretation of the will. The same may be said of the ruling in the Grayson case. 12 Ann. 646.

It is a fallacy to suppose that where a person dies owning separate property besides his share in the community, the disposable portion consists only of part of that share. His succession is necessarily made up of his separate estate and of his share in the community—the disposable portion, varying according to the number of the children left—from two-thirds to half and to one-third of the entire estate.

Hence, in the present case, as the property left by Moore consists of not only his separate estate, but also his half of the assets of the community, the disposable portion is of one-third of both, as he left more than three children.

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From all the foregoing, it is perfectly clear that, as Moore has not in any manner disposed, by testamentary disposition, *adversely* to the usufruct created by law in favor of his surviving wife, but has, on the contrary, confirmed that usufruct, it follows that his will must be maintained and his widow recognized as entitled to the disposable portion and to the usufruct over the rest of his property, to the extent to be hereafter set forth.

II.

The next question to be considered relates to the donation of securities and cash made by Moore to his wife, in New York and New Orleans.

We deem it unnecessary to review the testimony which was offered to show that Moore has never lost his domicile in New Orleans and has never acquired any in New York.

We are satisfied that the circumstances under which he left New Orleans, and which, it is needless to state, were such as to inspire him with the desire of leaving the city to seek tranquillity elsewhere; that he left with the intention of establishing another domicile in some other place, but we are not convinced that he did so in New York, as is claimed. The intention and the fact must co-exist. There is nothing substantial to show that that intention was ever realized beyond a doubt.

It does not, however, follow that the donations made by Moore to his wife, while they were in New York, and subsequently here, are nullities. They must be viewed as made in New Orleans. They, no doubt, were made and accepted *bona fide*. The donation made in New York consists in United States bonds to the amount of one hundred thousand dollars, and that in New Orleans, of money, seven thousand nine hundred and thirty-five dollars and fifty-seven cents, aggregating \$107,935.55.

The defendant denies that the donations are excessive, and even if such, that they can be reduced.

Surely, the widow, not being an heir, cannot be required to collate, if the donations exceed the disposable portion, but it is beyond all dispute that the plaintiffs, who are forced heirs, have, by the law, the right to bring an *action in reduction*. It is manifest that, unless they enjoyed that privilege, the exercise of which is optional with them, the articles of the Code, which prohibit excessive donation, when there exist forced heirs, would be dead letters; nay, read out of the book altogether. R. O. C. 1493, *et seq.*

Article 1504 admits the right, saying that it can be exercised by

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forced heirs only, but not by donees, legatees or creditors. R. C. C. 1502, 1703; also, H. D. Vol. Donations II. (d) 1, 5, 11, 15, 16, 18; C. N. 921, 922; Chabot, Vol. Adoption, Locré, p. 386, No. 28.

The authors are unanimous on the question, and recognize the extension of the right not only against concurrent heirs, but even against *strangers*. The wife may be benefitted as much as a stranger, but not more. She forms no exception. R. C. C. 1746; 1 Ann. 237; 7 Ann. 175; C. N. 920 *et seq*; V. Demolombe, Vol. 19, No. 189; Pothier Don. Sec. 3, Art. 5; Louré 11, p. 451; Duranton 8, N. 316; Merlin, Vol. Inst. D'her, Sec. 1, No. 9; Aubry & Rau., Vol. 7, p. 184, § 683; Laurent, Vol. 12, No. 152. See, also, Baudry Lacantinerie, Vol. 2, pp. 165-6.

It is because of that right of action, that the law provides that in determining the question of reduction, the property disposed of *inter vivos*, must be fictitiously added to that belonging to the donor at the time of his death and appraised at its value then. R. C. C. 1505, 1235.

It also emphatically provides, in calculating the disposable portion, that all the property donated or bequeathed by the deceased must be included, whether given to the children, to relations, or to *strangers*. R. C. C. 1234.

It, therefore, follows that the plaintiffs in this suit have a standing to demand a *reduction* of the donations, if the effects donated were, at the death of the donor, worth more than the disposable portion.

The amount of the property inventoried nears \$245,000; that of the bonds and cash foots some \$108,000.

It is claimed that, to the inventory should be added the separate property of the deceased, valued in the judgment at \$7000.

This would swell the inventory beyond \$350,000, donations included.

There is no proof in the record, that we have been able to discover, establishing the value of the bonds at the death of Moore, and there is no specific argument or prayer on the subject that can justify a decision presently of the question whether the donations exceed or not the disposable portion, so that this matter must be left open for future consideration and determination in other proceedings.

The donations, if excessive, would not, on that account, be null, but simply reducible. R. C. C. 1502.

In relation to the amount which Mrs. Moore claims to have loaned her husband, i. e., \$20,000, and which was the proceeds of coupons on the bonds, and was subsequently returned by him to her, it is enough to say that, if the bonds became her property by the donation or gift

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made of them to her, she necessarily was likewise the owner of the fruits yielded by them, and is not accountable therefor.

It has been contended that the donations are null, because not made in the proper form ; that is, by a notarial act, under Article, R. C. C., 1538.

The bonds payable to bearer were *corporeal moveable* effects, which could pass, without indorsement or assignment, by simple delivery, and may be considered as proper objects of a manual gift, which is not subject to any formality. R. C. C. 1539 ; V. Laurent, Vol. 12, pp. 351-2, Nos. 280 and 281.

III.

The third subject to be considered is the claim of the succession against the community, for the separate property of Moore, owned by him anterior to his marriage, and which was used for the benefit and advantage of the community.

The claim is stated to amount to \$20,000.

The district judge, however, did not recognize it to be so large. He admitted the claim for \$7000 only.

The plaintiffs have not prayed, by answer to the appeal, any increase of that allowance.

The appellant has not shown in what particular it is erroneous, and the evidence does not satisfy us that the finding of the lower court, in that respect, ought to be disturbed.

The judgment appealed from has recognized Mrs. Moore as a creditor of the community for \$2000.

The appellees have not complained of this allowance, and cannot expect any amendment on the subject.

The condition of the transcript and the absence of any pointed demand for any specific relief, as far as figures go in all cases, particularly as concerns the reduction of the donations eventually, do not permit us, as already intimated, to arrive at any particular result in that regard.

We will conclude in stating the manner and mode in which, keeping in view the matters involved in the present controversy, the Succession of John T. Moore ought to be and must be settled.

The mass of the succession must be composed of the separate property of the deceased, of his share in the common property, and of the value of the effects donated at the time of his death.

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After payment of the debts and charges against his estate, including the legacies and the \$2000 found in favor of Mrs. Moore, the net revenue must be divided into three equal parts.

The first third should be composed of the separate property of Mr. Moore, and in addition of such portion of his share in the community as may be necessary to complete that third.

Out of that third must be deducted the two legacies of \$10,000, and the residue of the third will accrue to Mrs. Moore in full satisfaction of the legacy of the disposable portion made to her by her husband, including the value of the effects and money donated to her by him in New York and in New Orleans, should there remain a *deficit* between the amount of the legacies added to the donations and the third of the entire estate, the *deficit* will have to be satisfied out of the share of the deceased in the community; but should, on the contrary, the amount of the legacies added to that of the donations, encroach beyond the third, on the remaining two-thirds, this surplus shall be forfeited by the widow, and she would take only the difference between the legacies and the amount of the third R. C. C. 1510.

Next, Mrs. Moore will be entitled to the usufruct of the remaining share of the deceased in the community during her widowhood, under the law, as confirmed by the will.

Finally, the portion of the estate of the deceased as shall be subjected to the usufruct of Mrs. Moore shall be deemed as the *légitime*, accruing in naked ownership to the nine children, as forced heirs of the deceased, share alike, the plaintiffs herein, viz: the minors, Flanagan and Mrs. Moore, Jr., jointly, to be entitled to two-ninths, and the minor, Hickey, to one-twenty-seventh of that portion.

For these reasons :

It is ordered and decreed that so much of the judgment appealed from as recognizes Mrs. Moore as a legatee for the disposable portion, and as a creditor for two thousand dollars and the succession as a creditor for seven thousand dollars, be affirmed, and that in all other respects it be reversed ;

It is further ordered and decreed that the donations made in New York and New Orleans be recognized as valid, the same to be allowed to Mrs. Moore in part satisfaction of her legacy of the disposable portion, and in case the same exceed that portion, that the surplus be declared forfeited by Mrs. Moore, to be made good by her to the succession, it being understood that the legacies of ten thousand dollars are to be first deducted from the disposable portion ;

It is further ordered and decreed that Mrs. Moore be declared

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entitled, during her widowhood, to the usufruct of the share her husband inherited by the issue of their marriage, as shall remain after satisfaction of the disposable portion; and,

It is further ordered and decreed that the plaintiffs and the other children and grandchildren be recognized together as entitled, in their capacity of forced heirs to the deceased, to the naked ownership of the two-thirds or portion of his share in the community as is subjected to the usufruct of Mrs. Moore, or the minors, Sullivan and Mrs. Moore, Jr., to one-ninth each of said same share, and the minor, Hickey, to one-twenty-seventh thereof.

It is further ordered and decreed that the appellees pay costs of appeal.

Mr. Justice Watkins dissents on the question of usufruct and concurs in other respects.

ON APPLICATION FOR A REHEARING.

The salient complaint is levelled against the allowance of the disposable portion and usufruct, claimed by the widow.

The brief in support is a mere repetition of what had been previously said and written on the subject, on behalf of the plaintiffs and an ingenious criticism of the opinion in the case attacking it on matters of secondary importance, without, in the least, impairing its solidity and correctness on the main issue.

I.

The petitioners rely explicitly on a decision which we had not thought proper to notice specially, and which, they contend, has an immediate favorable bearing; that is the case of *Grayson vs. Sanford*, 12 Ann. 646.

In that suit, it appears that the testator had bequeathed to his widow the usufruct of his property, and in case of a suit for a partition by any of his children, all the property he could dispose of by law forever.

There was brought such suit and the widow claimed the usufruct, but not the disposable portion.

The court said that the principal question was, whether she was entitled to the usufruct or to the disposable portion, and that the solution of the issue depended on the *interpretation* of the will.

The question did not arise, whether the widow was entitled to *both* the usufruct *and* the disposable portion, for the plain reason that it

was not the intention of the testator that she should have *both*, but either the one or the other.

He willed her the usufruct and eventually the disposable portion.

It is true that the court gave her the disposable portion—i. e., one-third—there being more than three children; but it does not appear that she ever claimed that portion included the usufruct over the share of the deceased in the community, and hence the court did not pass upon it. It could not have rendered judgment *ultra petitem*, or for more than was at issue.

There is to be found no precedent in the reports in which both the usufruct and the disposable portion as known previous to the passage of the act of 1844 were claimed by the surviving spouse.

The rulings in 9 ANN. 398 and in 13 ANN. 424 have no bearing upon the present controversy. The first relates to matter within the first provision of the act, and the second has already been met in the opinion.

The construction placed by the petitioners on the purport and tenor of the act of 1844 or Article R. C. C. 916, is the result of a confusion of ideas on the subject. They seem to consider that certain articles of the Code of 1825 form part of the organic law and are not susceptible of repeal, or amendment by the law-making power; but such is not the case. The Legislature can amend laws.

The act of 1844 has surely modified those articles, so that the rights which the surviving spouse had, when there existed a community with the deceased, prior to that legislation, are broader eventually to-day, and that the same extend over the share of the deceased in the community in the shape of a usufruct, for a time, varying according to certain circumstances stated, subject to the right of the predeceased spouse of disposing by will, so as to defeat that usufruct.

We have not held that the share constituting the *legitime* reserved to forced heirs has been decreased, or may be encumbered by a testator.

The share accruing to such heirs is the same to-day as it ever was, with this difference, that it is encumbered, not by the testator, but by the law, with a usufruct in favor of the surviving spouse in community when the predeceased has not by his will determined otherwise.

We hold that a spouse in community can legally bequeath to the survivor the disposable portion of his or her estate, as it always was known, and may confirm in his or her favor, the usufruct provided by law, either by remaining silent or by expressing himself clearly on the subject, the language used, whether a bequest or a ratification, being immaterial.

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II.

After a review of what we said on the question of the \$20,000, included in the \$27,630.55, and claimed by Mrs. Moore for as much reimbursed to her by her husband, in satisfaction of coupons lent him by her, we think it preferable that the whole matter be left open for future consideration, in the proceeding which the heirs may bring against Mrs. Moore for an account.

Our opinion will, therefore, be accordingly considered as silent on the subject. The same may be said of that portion of the decree which alludes to the *New Orleans* donation.

This disposition embraces the surplus of the \$20,000, namely the \$7635.55, which will have also to be accounted for.

III.

We have not considered the \$10,720.58 to which the petition for a rehearing refers, as having been deposited in bank to the credit of Mrs. Moore, after October 20, 1885, and which are said to belong to Moore or his succession. We did not deem them at issue by the pleadings. The door remains open for any claim which the plaintiffs may have on this or any other subject not expressly passed upon, when they will call on Mrs. Moore for an account of anything which is not hers.

IV.

Neither did we allude, for a like reason, to the city consolidated bonds alleged to have been taken from the bank box, between Moore's death and the day of inventory by Mrs. Moore, in satisfaction of her claim of \$2000, which the plaintiffs admit to be due her. The liability of Mrs. Moore for these bonds remains also a matter for future consideration.

V.

Neither did we concern ourselves with the alleged donation made to Mrs. Gibbons, a daughter of Moore, as there was no issue on the subject. Necessarily, if the donation was made and is subject to collation, it will have to be deducted from the disposable portion, when ascertained.

VI.

It was a matter of indifference, for the purposes of the opinion, to consider the value of the United States bonds at Moore's death.

All effects donated, to whomsoever, or illegally withheld, will have to be fictitiously or actually added to the property left by Moore and

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in actual existence, as his, at the time of his death, and will have to be appraised at their value then, in order to ascertain the disposable portion.

VII.

Finally. We see no reason to change the conclusion previously reached, that the bonds, which are payable to bearer, and the title to which is transmissible without any indorsement or assignment by mere delivery, are not subject to any formality, save that of tradition and acceptance.

To make the alterations mentioned, it is unnecessary to grant a rehearing.

It is, therefore, ordered and decreed that the original judgment herein be amended so as to eliminate from it such portion as refers to any donation made in *New Orleans*, and that, in other respects, it remains undisturbed.

Rehearing refused.

Mr. Justice Fenner files a concurring opinion.

Mr. Justice Watkins adheres to his original opinion on the question of usufruct and concurs in other respects.

WATKINS, J. I make the following extract from the brief of Mrs. Moore's counsel, viz:

"John T. Moore died on 29th March, 1886, in this city, leaving nine children, or their descendants, and a surviving spouse, the mother of said children; *all his property belonged to the community which had subsisted between him and his surviving widow, Agnes Jane Byrne, to whom he was married in 1845.*

"The plaintiffs in these suits are the minors Flanagan, represented by their natural tutor, who had married one of the daughters of the deceased, and the minor Hickey, represented by his natural tutor, who had married another daughter, and Julia, another daughter of the deceased, who married John T. Moore, Jr.

"All the unmarried children of the deceased, and also Mrs. Gibbons, a married daughter, living in St. Louis, adhere to their mother in this controversy.

"John T. Moore died testate, having executed a will dated 20th October, 1885, and a codicil dated 27th February, 1886.

"The will is in these words: 'All the property I am possessed of consists of community property. I give, devise and bequeath unto my wife, Agnes Jane Byrne Moore, the usufruct during her natural life of all the property I may die possessed of, community or not community.

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I hereby appoint my said wife executrix of this my last will and testament, with seizin of my entire estate, and without any bond or security whatever, and without an inventory of my estate.'

"The codicil, after giving a special legacy of \$5000 unto Mrs. Burke, a sister of the deceased, and a special legacy of \$5000 to the Society of St. Vincent de Paul, proceeds as follows:

" 'I give and bequeath unto my said wife, Mrs. Agnes Jane Byrne Moore, *the disposable portion of all the property, real and personal, movable and immovable, in whatsoever the same may consist, and wheresoever situated, I may own or possess at the time of my death, and to that end I constitute my said wife my universal heir and legatee.*

" *"I do hereby declare that this is a codicil to the last will and testament, already referred to, as having been made by me by act before W. J. Castell, late a notary public in this city, on 20th October, 1885, which said last will and testament shall be and remain in full force and effect."*

"The plaintiffs in these cases demand the *immediate possession and enjoyment of their share of the succession of the deceased, free from the usufruct of the surviving widow.*"

The act of 1844 in relation to the survivor's legal usufruct of his share in the community, was, in its revision in 1870, incorporated into the Civil Code as Articles 916 and 917, and the former is couched in these words, viz:

"In all cases, when the predeceased husband, or wife, shall have left issue of the marriage with the survivor, and shall not have disposed, by last will and testament, of his or her share in the community property, the survivor shall hold in usufruct, during his or her natural life, so much of the share of the deceased in such community property as may be inherited by such issue," etc.

The question for decision is: Whether or not the deceased disposed, by last will, in favor of his wife, "of his * * share in the community property."

What was the "share in the community property," of which he could have disposed by last will in favor of his surviving widow—his *entire estate* consisting of his *half* of the community property.

His will bequeathed, in her favor, "*the disposable portion of his property.*" Now, inasmuch as *his half* of the community property was *his estate*, he, necessarily, bequeathed one-third of his half of the community property, and he could not have validly bequeathed her more. *Ergo*, the deceased did dispose, by last will, "of his *share* in

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the community property"—i. e., the share in it of which he *could* legally dispose by last will.

What is the necessary result?

In my opinion it is, that the surviving widow cannot "hold in usufruct so much of the share of the deceased in such community property as may be inherited by such issue."

It must be carefully observed that the phrase, "share in the community property," is repeated in the cited article, and *as* repeated, one serves to interpret the other

Paraphrase, and state the sentence affirmatively, thus:

In case the predeceased husband shall have left issue of his marriage with the survivor, and shall have disposed, by last will, of "his share in the community property, the survivor shall (*not*) hold in usufruct * * so much of the share of the deceased in *such* community property as may be inherited by *such issue*."

Now, I respectfully submit, that, if the true intent of the Legislature was, and the true meaning of the law is, that, in order to have the effect of destroying the legal usufruct of the survivor, the last will of the deceased should have disposed of his *half* of the community property, the second clause of said article would be rendered nugatory and meaningless, for the obvious reason that there would remain nothing "to be inherited by such issue."

The law contemplated that the bequest should leave something that might "be inherited by such issue." The law would have been inconsistent with itself, if it were otherwise, because "the issue of the marriage" are forced heirs.

To my thinking, the conclusion is irresistible, that when, as in this case, the deceased husband, leaving more than three children as "the issue of his marriage with the survivor," has bequeathed to her the disposable portion of his estate—it being one-half of the community property—the remaining two-thirds of such half is liberated from the widow's legal usufruct, and passes to "such issue" in full ownership.

This two-thirds is "*so much* of the share in such community property" as would remain after the widow's one-third is subtracted therefrom; and is "so much of the share in such community as may be inherited by such issue."

I understand that the question here was squarely presented, and as squarely decided by the Court, in *Forstall vs. Forstall*, 28 Ann. 197, to which reference is made in the opinion of the Court.

The Court say: "This is a controversy between the surviving widow and universal legatee of Edmond J. Forstall and the children,

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the forced heirs, in regard to the share of the deceased in the community property; the widow contending that she is entitled to *one-third*, the disposable *quantum*, and to a usufruct of the two-thirds reserved by law to the numerous heirs of the deceased; and the heirs contending that they are entitled, in *full ownership*, to the two-thirds reserved to them by law."

• • • • •

"Edmond J. Forstall disposed in favor of the surviving widow by last will and testament, bequeathing to her his share of the community property. As there are more than three legitimate children, the legacy must be reduced to one-third, and the heirs are entitled, in full ownership, to two-thirds of the property of their father.

"The surviving widow is not entitled to the usufruct of this two-thirds, because the deceased disposed, by last will and testament, of his share of the community property.

• • • • •

"Where there has been no testamentary disposition of the disposable share of the predeceased husband or wife in the community property, the survivor shall be entitled to a usufruct during his or her natural life of so much of the share of the deceased in such community property as may be inherited by such issue. The condition upon which the survivor shall have a usufruct is, that the predeceased husband or wife shall not have disposed of his or her share—that is the share that he or she was permitted by law to dispose of."

That case was argued and decided on the theory that the legacy of the widow was not only reducible, but reduced to the disposable *quantum*. That was all she claimed under the will. As thus presented the instant case is precisely the same.

The argument is made in support of the defendant's contention that the *entire share* of the deceased is meant that the deceased could have bequeathed to his children his *half* of the community property, and that *such* bequest could dissolve the survivor's usufruct and no other.

But I deny that the deceased could have made such a will. An excessive donation *mortuo causa* is valid only for the disposable *quantum*, because the law vests the remainder in the forced heirs.

In the succession of Schiller, 33 Ann. 1, this court considered and interpreted a will couched in these words, viz:

"It is my will and desire that my debts be paid, and that my estate be *distributed* among my legal heirs, according to the laws now in force in Louisiana."

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The Court says: "The question presented simply is:

"Whether, by the phrase used, Schiller has or not *disposed of his share in the community*. If he has, his three children have inherited his half therein *free* from their mother's usufruct. If he has not, they have inherited it *subject* to that usufruct during widowhood.

* * * * *

"It is manifest that he has *disposed of his estate*, that is, of all the property belonging to him at his death, in favor of certain persons, and in certain proportions. *That property consisted of his half interest in the community between him and his wife,*" etc.

The court held this language to mean that the deceased's one-half of the community property "should accrue unburdened, and be delivered at once, to his three children." But they did not say that such one-half passed to them by the will. On the contrary, they do say:

"The children inherit the naked ownership of two-thirds of the one-half of their father in the community property by the *effect of the law*; they inherit the remaining one-third, and the enjoyment of the entire half, to the exclusion of their mother's usufruct, by the *effect of the will* of their father, who, by *abstaining* from making *any will*, could have permitted his wife to enjoy such half as usufructuary during her widowhood."

In this opinion the following propositions are distinctly announced, viz:

1. That the will of the deceased disposed of his share in the community property.
2. That his estate was his share in the community property.
3. That the three children inherited two-thirds thereof by the *effect of the law*.
4. That they inherited the remaining one-third by the *effect of the will*.
5. That the children were entitled to the enjoyment of the *half* to the exclusion of their mother's usufruct.

These conclusions, in my opinion, are correct, and confirm those I have herein expressed.

They are in exact accord with those entertained by our predecessors, as found reported in *Grayson vs. Sanford*, 12 Ann. 647, in which the Court said:

"The principal point at issue in this cause is, whether the surviving widow is entitled to the *usufruct of the half* of the community belonging to the estate of her deceased husband, or whether she shall take the *portion* thereof which her husband *could dispose* by law."

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The intimation is clear that she could not be allowed both.

Thereupon the court decided that "the rights of the widow are fixed by the will to the disposable portion," and declared her entitled to one-half of the community property, in her own right, and to *one-third of her deceased husband's* share in said community; and the legal heirs—of whom there were seven—to the remaining two-thirds of same, in full ownership and to a decree of partition.

That opinion describes with precision and accuracy the claims of the forced heirs of Mr. Moore, and clearly defines their legal rights. It is my opinion that the legal usufruct of his widow, their mother, was broken by her acceptance of the benefits of his will, and that his forced heirs are entitled to be put in to *immediate* possession of their inheritance.

For these reasons I cannot concur in this *part* of the opinion and decision of the majority.

SEPARATE OPINION.

FENNER, J. Under the light thrown on it by the able brief for rehearing, I have given additional consideration to the interesting question touching the usufruct. To my mind it is perfectly clear that articles 915 and 916 of the Civil Code announce the policy of the law concerning the disposition of community property at the death of one of the spouses. That policy is, that the survivor shall have the usufruct of the share of the deceased therein in two cases, viz: 1. Where the deceased has left no ascendant or descendant. 2. Where he has left descendants, issue of the marriage with the survivor, in which case the usufruct extends only to the portion inherited by such issue.

But these, like most other provisions for legal inheritance, are subjected to the power of testamentary disposition by the decedent. They are based upon the assumption that the legal dispositions conform to the natural desires and wishes of the deceased in absence of any expression of a contrary will. But when he has exercised the testamentary power, and has not left his property to be disposed of by the law, but has himself directed how it shall go, so that those who take it, take under the will and not under the law, then the will must be executed and so much of the community property as passes under the will passes free from the usufruct. Hence the law says that the usufruct shall accrue only when the deceased "shall not have disposed by last will or testament of his or her share in the community property." Why? Because when he has thus disposed of his share, he has left nothing for the law to operate upon, but has subjected the whole to

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After payment of the debts and charges against his estate, including the legacies and the \$2000 found in favor of Mrs. Moore, the net revenue must be divided into three equal parts.

The first third should be composed of the separate property of Mr. Moore, and in addition of such portion of his share in the community as may be necessary to complete that third.

Out of that third must be deducted the two legacies of \$10,000, and the residue of the third will accrue to Mrs. Moore in full satisfaction of the legacy of the disposable portion made to her by her husband, including the value of the effects and money donated to her by him in New York and in New Orleans, should there remain a *deficit* between the amount of the legacies added to the donations and the third of the entire estate, the *deficit* will have to be satisfied out of the share of the deceased in the community; but should, on the contrary, the amount of the legacies added to that of the donations, encroach beyond the third, on the remaining two-thirds, this surplus shall be forfeited by the widow, and she would take only the difference between the legacies and the amount of the third R. C. C. 1510.

Next, Mrs. Moore will be entitled to the usufruct of the remaining share of the deceased in the community during her widowhood, under the law, as confirmed by the will.

Finally, the portion of the estate of the deceased as shall be subjected to the usufruct of Mrs. Moore shall be deemed as the *légitime*, accruing in naked ownership to the nine children, as forced heirs of the deceased, share alike, the plaintiffs herein, viz: the minors, Flanagan and Mrs. Moore, Jr., jointly, to be entitled to two-ninths, and the minor, Hickey, to one-twenty-seventh of that portion.

For these reasons :

It is ordered and decreed that so much of the judgment appealed from as recognizes Mrs. Moore as a legatee for the disposable portion, and as a creditor for two thousand dollars and the succession as a creditor for seven thousand dollars, be affirmed, and that in all other respects it be reversed ;

It is further ordered and decreed that the donations made in New York and New Orleans be recognized as valid, the same to be allowed to Mrs. Moore in part satisfaction of her legacy of the disposable portion, and in case the same exceed that portion, that the surplus be declared forfeited by Mrs. Moore, to be made good by her to the succession, it being understood that the legacies of ten thousand dollars are to be first deducted from the disposable portion ;

It is further ordered and decreed that Mrs. Moore be declared

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entitled, during her widowhood, to the usufruct of the share her husband inherited by the issue of their marriage, as shall remain after satisfaction of the disposable portion; and,

It is further ordered and decreed that the plaintiffs and the other children and grandchildren be recognized together as entitled, in their capacity of forced heirs to the deceased, to the naked ownership of the two-thirds or portion of his share in the community as is subjected to the usufruct of Mrs. Moore, or the minors, Sullivan and Mrs. Moore, Jr., to one-ninth each of said same share, and the minor, Hickey, to one-twenty-seventh thereof.

It is further ordered and decreed that the appellees pay costs of appeal.

Mr. Justice Watkins dissents on the question of usufruct and concurs in other respects.

ON APPLICATION FOR A REHEARING.

The salient complaint is levelled against the allowance of the disposable portion and usufruct, claimed by the widow.

The brief in support is a mere repetition of what had been previously said and written on the subject, on behalf of the plaintiffs and an ingenious criticism of the opinion in the case attacking it on matters of secondary importance, without, in the least, impairing its solidity and correctness on the main issue.

I.

The petitioners rely explicitly on a decision which we had not thought proper to notice specially, and which, they contend, has an immediate favorable bearing; that is the case of *Grayson vs. Sanford*, 12 Ann. 646.

In that suit, it appears that the testator had bequeathed to his widow the usufruct of his property, and in case of a suit for a partition by any of his children, all the property he could dispose of by law forever.

There was brought such suit and the widow claimed the usufruct, but not the disposable portion.

The court said that the principal question was, whether she was entitled to the usufruct or to the disposable portion, and that the solution of the issue depended on the *interpretation* of the will.

The question did not arise, whether the widow was entitled to *both* the usufruct *and* the disposable portion, for the plain reason that it

Gomila & Co. vs. Insurance Company.

The opinion of the Court was delivered by

POCHÉ, J. This litigation grows out of a contract of insurance of a cargo of coffee and cigars, shipped from Vera Cruz to Matamoras, Mexico, the amount covered by insurance being \$9300, and the same is herein claimed by plaintiffs on an alleged total loss of the cargo.

As no regular policy of insurance was issued, plaintiffs declare on two separate applications made by them and accepted by the defendant, one for \$4500 and the other for \$4800, on an open marine policy which they then carried on with the defendant, both applications having been made and accepted on October 30, 1880.

They aver that the schooner "Veloz Maria," on which the goods were shipped, sailed from Vera Cruz in a staunch and seaworthy condition, on the 6th of November, 1880, but the vessel, having met up with a storm, was so damaged that she was compelled to put in on the 22d of the month, at Alvarado, a small seaport on the Mexican coast, where she was forced, by her disabled condition, to land her cargo, itself in a very damaged condition, and there the voyage was abandoned.

They further aver that after due proceedings by the proper authorities, showing that the goods were too seriously damaged for reshipment, the same were sold at public auction, realizing the sum of \$2510, with net proceeds, after deduction of necessary costs, in the sum of \$2322.26, which sum was deposited in Vera Cruz to the credit of whom it may concern. Hence, they claim as in case of total loss and abandonment.

It appears that after the institution of the suit, the names of Francisco Armendaiz and Marcelino Rougier, of Mexico, the alleged co-owners and consignees of the cargo, were substituted as plaintiffs in the cause.

The defense is, substantially:

1. That the open marine insurance policy at one time existing between Gomila & Co. and the defendant had been cancelled and rescinded previous to the date of the contract of insurance sued on.
2. The said contract was against total loss only, and the denial that a total loss was sustained in the venture.
3. That Gordon & Co., or Gordon & Gomila, had no insurable interest in the goods in question.
4. A denial that the damage occasioned to the goods was caused by the perils of the sea, and a denial of the existence of any condition of things to justify the abandonment of the voyage or the sale of the goods.

The judgment below was in favor of plaintiffs for a partial loss, in the sum of \$6600, whereof \$3400 in favor of Francisco Armendaiz and \$3200 in favor of Marcelino Rougier.

Defendant appeals and plaintiffs seek, by answer to the appeal, to recover the full amount of their claim, \$9300.

On appeal defendant makes the point that F. Armendaiz and M. Rougier are not the insured in the contract sued on, and have, therefore, no standing in court as plaintiffs. But the record contains a summary answer to that contention in the shape of a "Petition for Removal" of the cause from the State to the Federal Courts, filed by the defendant company some time previous to the motion suggesting Rougier and Armendaiz as the proper plaintiffs in the cause, in which petition it was alleged that said "F. Armendaiz and M. Rougier were the real plaintiffs in said suit." That judicial declaration is manifestly a complete estoppel to a contrary assertion on the part of the defendant.

1. Our examination of the record and of the conflicting testimony which it contains, has satisfied us that all the material facts alleged and relied on by plaintiffs are sustained by the preponderance of the evidence.

Hence, we find and we hold that the open marine policy between Gomila & Co. and the defendant had not yet been cancelled or rescinded at the date on which the insurance contract sued on was entered into.

It is true, that the book which contained the agreement was not produced on the trial, but its existence and its loss were satisfactorily accounted for. The burden was on the defendant, which acknowledged the previous existence of the contract, to prove its alleged cancellation. But in this the company entirely failed, its witnesses being unable to give the precise date of such cancellation, which is stated to have been between the first and the thirty-first of October, 1880, or to give the date of the notice to Gomila & Co. of the alleged cancellation, if, in fact, such notice had ever been given. The effect of that testimony, in itself weak and unsatisfactory, is effectively counteracted by the fact that the two applications of October 30, 1880, made by Gordon & Gomila and adopted by the insurance company, both refer to the open marine policy existing at the time, and by the additional fact that both were entered in the "Open Marine Risks Book" of the company.

2. The conclusion thus reached by us disposes of the contention touching the absence of interest in Gomila & Co. to bring the suit, the

Gomila & Co. vs. Insurance Company.

open marine policy contained the stipulation that the insurance was made "for account of whom it may concern," and it throws the burden on the company to prove that the contract was for total loss only.

3. In support of that contention the company relied on parol testimony, but that kind of evidence was clearly inadmissible under the contract, as proved by plaintiffs, and, like the district judge, we must decline to give it any consideration or effect. C. C. Arts. 2:276, 2:235, 2:238; Bell vs. Western Marine Ins. Company, 5 Rob. 423; Courtney vs. Mississippi Marine Co. 12 La. 233; Packet Company vs. Brown, 36 Ann. 138.

4. Defendant's denial that the damage resulted from the perils of the sea is not supported by the record.

The preponderance of the evidence is overwhelming in the proof of the contrary.

It shows that, owing to the violence of the storm, the vessel was blown entirely out of her course, and that she put into a port, situated southeast of the point of departure, her course being northwest of that point; that she arrived at Alvarado quite disabled and taking water very rapidly and dangerously, and that, in consequence of her condition, the voyage was abandoned, the vessel remaining four months at that place, whence she was towed to Vera Cruz, where she was subsequently converted into and is now used as a port lighter. We also find that her cargo was too badly damaged for re-shipment, and that the best disposition was made of it which the nature of the surrounding circumstances would admit of. On that point the testimony is simply destructive of all of the defendant's contentions and theories on the subject.

Hence, we must hold the company liable under the contract, but not for a total loss. The record contains no evidence of an abandonment of the venture by the insured, and *a fortiori* no proof of a notice of the same on the insurer. In the absence of such proof it is elementary that the insured cannot successfully claim, as in case of a total loss. The amount deposited in Vera Cruz, to the credit of whom it may concern, added to the amount allowed in the judgment, will very nearly cover the full amount of the insurance on the cargo.

Our review of the case has convinced us that the district judge has done full justice to all parties in the cause.

Judgment affirmed.

Cambon vs. Lapene.

ON APPLICATION FOR REHEARING.

FENNER, J. Appellees call our attention to the omission in the judgment of any allowance of interest, and to their prayer for an amendment in this respect. As they failed to refer to this matter in their briefs, it escaped our notice. They are, however, so clearly entitled to interest, at least from judicial demand in this suit, that the matter cannot admit of controversy, and we may amend our judgment to that extent without a rehearing. 33 Ann. 190.

It is, therefore, ordered that our former decree herein be amended by amending the judgment appealed from in so far as to grant legal interest on the amounts allowed therein from judicial demand, viz., July 16th, 1883; and that otherwise it remains undisturbed, and that the rehearing applied for by appellant be refused.

No. 10,071.

HENRY CAMBON VS. JULES LAPENE.

MME. V. CALLIER, THIRD OPPONENT.

Where property has been sold for taxes, and the taxpayer redeems it within the term allowed therefor, the one who lends him the money to enable him to redeem it does not thereby become invested with title to the property, although the act acknowledging the loan contains an express subrogation of the lender to his (the taxpayer's) rights. The title is in the purchaser at the tax sale, and he alone could pass it to another; and when it was redeemed the title reverted to the original owner, and could be made liable for his debts.

A PPEAL from the Civil District Court, Parish of Orleans.
Righthor, J.

Charles Louque and Henry L. Lazarus for Plaintiff and Appellant.

Gibson & Hall for Defendant and Appellee.

The opinion of the Court was delivered by

TODD, J. The plaintiff under a judgment in his favor against the defendant seized a plantation situated in the parish of Terrebonne and described in the pleadings as his property to satisfy the debt.

Mrs. Virginia Callier (widow) claimed, by third opposition, to be owner of the property, seized and enjoined its sale under the writ of execution.

The plaintiff in answer to the petition of third opponent pleaded the general issue.

The case was tried, the opposition dismissed and the injunction dis-

Sully vs. Spearing.

solved, with seventy-five dollars damages for attorney's fees, and Mrs. Callier has appealed.

On the 14th of April, 1885, this plantation was sold at tax sale as the property of the defendant Lapene, and was bought by one John Buger.

On the 13th of April, 1886, the property was redeemed by Lapene, as evidenced by a notarial act of that date passed before a notary public in the parish of Terrebonne.

On the same day, Mrs. Callier and Jules Lapene appeared before the same notary and entered into an act substantially as follows :

After reciting the sale of the property for taxes, and its purchase at such sale by Buger, and that Lapene, the taxpayer and owner, had the right to redeem the property within a year after the tax sale, it was declared that Lapene was unable to make said redemption, or was without the means to do so, and that in order to raise the money to redeem the land he had borrowed of Mrs. Callier \$543.80, and the receipt of Lapene for this sum was made part of the act; and it was further declared that Lapene intended, quoting, "to subrogate the lender in the rights of the creditors," and further, again quoting: "It is understood and agreed that said Jules Lapene or any of his creditors * * * shall have the right within one year from this date (13th April, 1886) to redeem said property on paying one thousand dollars.'

John Buger, the purchaser at the tax sale, was no party to this instrument.

It is exclusively on this act that the asserted title of Mrs. Callier to the property rests.

Beyond the fact that it evidenced the loan of the money by Mrs. Callier to Lapene, and fixed the liability of the latter for the sum loaned, it seems to us that the act was without any legal effect or significance whatever.

It certainly did not convey to Mrs. Callier any title to the land either from Buger or from Lapene, and we cannot discover that it subrogated her to any right to or against the property in question.

Thus concluding, the judgment of the lower court is affirmed with costs.

No. 10,160.

THOMAS SULLY vs. JOS. H. SPEARING.

In this action for slander of title, defendant, by setting up title in himself, converts it into a petitory in which he must be treated as plaintiff carrying the burden of clearly establishing his claim.

Plaintiff showing a title derived from the undisputed owner in 1851, cannot be ousted by

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Sully vs. Spearing.

defendant, who claims under a judicial sale made in a proceeding *in rem* in 1852, without clearly proving that the sale and proceeding were of a character to operate a valid divestiture of the property, particularly when the judicial sale was not followed by possession, and when the property had never been assessed or taxed in his name or those of his authors, but had, for a long period, been assessed in the name of plaintiff's authors, and had been possessed and valuably improved by plaintiff without notice of defendant's claim.

A PPEAL from the Civil District Court for the Parish of Orleans.
Voorhies, J.

Henry P. Dart for Plaintiff and Appellee.

J. Zach. Spearing for Defendant and Appellant.

The opinion of the Court was delivered by

FENNER, J. This is a jactitation suit brought by plaintiff in possession of the immovable in controversy against the defendant who slanders his title.

Defendant answers setting up title in himself and thereby converts the action into a petitory one in which he must be treated as plaintiff. *Dalton vs. Wickliffe*, 35 Ann. 356.

Both parties present recorded chains of title running back to the same author, Charles Pitts.

Sully's title is derived from a sale by Charles Pitts to M. A. Fortier, passed June 21, 1851.

Spearing's title flows from a sheriff's sale of the same property made in a certain proceeding in a justice's court of the city of Jefferson, entitled "Mayor, Aldermen and Inhabitants of the City of Jefferson vs. Two Lots, Nos. 10 and 11, in Square No. 61 in Faubourg, East Bouigny, assessed in the name of Charles Pitts," which sale was made on October 4, 1852, more than a year after Pitts had sold to Fortier.

In order to avail against the prior conveyance to Fortier, it was of course absolutely essential for defendant to show that the sheriff's sale and the proceeding in which it was made were of a character to operate a valid translation of the property irrespective of the prior transfer.

This he has failed to do. The record of the suit in which the sale was made is lost, and we have no knowledge of its nature or validity, except such as is derived from its mere title as given in the sheriff's deed.

This is clearly insufficient, under the circumstances of this case, where defendant does not show that he or his authors have ever exercised ownership over the property, have ever accepted it, or reduced it to possession, or had it assessed in their names or paid any taxes on

Antoine vs. Smith et als.

it, and where it further appears that both he and his immediate author acquired under an express exclusion of warranty.

On the other hand plaintiff was in actual possession and had made valuable improvements on the lots, before defendant or his immediate author acquired their unwarranted titles. When plaintiff bought he had no notice of defendant's pretension, and an examination of the records carried his chain of title back to 1851, beyond the longest term of prescription. He further showed that the property had been assessed in the names of his authors at least since 1870 and the taxes paid presumably by them.

We consider that defendant has failed to establish a title *causa idonea ad transcendendum dominium*, which he was bound to do clearly and beyond question in order to recover against plaintiff, who is not a mere trespasser, but a possessor in good faith under deeds on their face translatiue of property. *Peck vs. Bemiss*, 10 Ann. 160; *Concy vs. Cummings*, 12 Ann. 748; *Bedford vs. Urquhart*, 8 La. 239.

We consider, however, that the case presents no ground for the damages claimed by plaintiff.

Judgment affirmed.

No. 10,161.

C. C. ANTOINE VS. D. D. SMITH, ET ALS.

Where the cause of the contract sought to be enforced is unlawful and opposed to good morals and public policy there is no right of action in the courts, for either party *suing through it*, to enforce it.

But, after the reprobated transaction has become an accomplished fact, neither party can legally interpose such illegality or turpitude as a defense.

An instrument cannot be rejected and disregarded as not evidencing a compromise because it does not contain the formal words "for preventing or putting an end to a law suit."

Under our system of practice nothing is sacramental, as a matter of form, unless made so by statute.

The disproportion of the amount received as compared with that of the amount demanded, is no cause for the rescission of the transaction otherwise valid, and same cannot be explained or disclosed by parol evidence.

Error, fraud or the like must be formally averred against it and proved, to avoid it.

A PPEAL from the Civil District Court for the Parish of Orleans.
Voorhies, J.

Rouse & Grant and T. J. Semmes for Plaintiff and Appellant:

A compromise may be set aside under the civil law, unless founded on a doubtful right. 28 Laurent, Nos. 324-5; 9 Marcadé, Nos. 471, 568-9; 18 Duranton, Nos. 395-8; 3 Aubry & Rau, p. 476 (F.); 3 Mourlon, N. 1170; Domat, vol. 3, p. 10. No. 1.

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40	560
47	852
40	560
110	616
40	560
123	819

Antoine vs. Smith et als.

The rule is the same as common law. *Stapleton vs. Stapleton*, 1 Atkyns 10; *Broderick vs. Broderick*, 1 P. Wm. 241; *Lucy's Case*, De G. McN. & G. 364; *Ex-parte Banner*, 17 Ch. Div. 483; *Wheeler vs. Smith*, 9 H. 82.

An agent is not permitted to deal with the principal unless there be the utmost good faith on his part, a full disclosure of all the facts, and the absence of all undue influence and advantage. 1 Story's Eq. Jur., Sects. 217, 246, 315, 316, 323; *Brook vs. Martin*, 2 Wallace, 70.

An agent is a fiduciary and subject to the same rules as a trustee in dealing with his principal. 1 Perry on Trusts, Sec. 206.

Ubertima fides. The utmost good faith is exacted from him in all his transactions touching the interests of his principal. *Meeker vs. York*, 13 Ann., 18; *Nolan vs. Shaw*, 6 Ann. 40.

A contract by which a person exacts an advantage from another for doing what he is already bound to do, by the law or by a subsisting agreement, is immoral, against justice and void. 1 Pothier, 3 Am. Ed., p. 123.

At the common law, such a contract is void for want of consideration. Pollock on Contracts, p. 162.

A sale for a price out of all proportion to the value of the thing sold is void. C. C. 2464.

Where the inadequacy of price is so marked as to shock the conscience of a man of common sense, it amounts to fraud, in which case the inadequacy itself, *ex evidentia rerum*, proves fraud. *Osgood vs. Franklin*, 2 Johns., Ch. 1; *Eyres vs. Potter*, 15 H. 42.

A release of the owner's title to property for consideration, is subject to the same rule as the contract of sale, it being in effect a sale.

Third persons can claim the benefit of stipulations in contracts only where such stipulations are clear, plain and unequivocal. *Mitchell vs. Cooley*, 5 R. 240.

Leonard, Marks & Bruen for Defendant and Appellee:

1. An act under private signature, when signature is admitted, has against the parties the force and effect of an authentic act. C. C. 2242. It is full proof of the agreement contained in it. C. C. 2236.
2. The instrument of date of Sept. 4th, 1884, annexed to answer, is an agreement—a commutative contract. C. C. 1761-5-8.
3. It is conclusive against plaintiff's demand, unless fraud, error or violence be shown, and the burden of proof is on plaintiff. C. C. 1819, 2232.
4. A transaction or compromise is an agreement between two or more persons who, for preventing or putting an end to a law suit, adjust their differences by mutual consent in the manner in which they agree on and which every one of them prefers to the hope of gaining balanced by the danger of losing. C. C. 3071. It must be reduced to writing, but is not otherwise subject to any form. C. C. 3071. Whenever it appears from the agreement itself, or from evidence *dehors* the written instrument, that it was an adjustment of differences by mutual consent for the purpose of preventing or putting an end to a lawsuit which each party prefers to the hope of gaining balanced by the danger of losing, such agreement is a compromise. *Sirey*, Art. 2044, No. 5; *Stewart & Co. vs. Haas et al.*, 23 Ann. 783.
5. Transactions have between the parties a force equal to the authority of the thing adjudged. They cannot be attacked on account of any error in law or any lesion. C. C. 3078.

Obligations are extinguished by remission. C. C. 2130. The release of a debt liberates the debtor *pleno jure*. Pothier, 570. The *pactum remissorium*—*pactum de non petendo* is binding; all that is required to give it validity is a simple convention or agreement.

Antoine vs. Smith et als.

It always avails the debtor as an exception to the action instituted by the creditor. *Monton vs. Noble*, 1 Ann. 194. It cannot be revoked by the creditor. C. C. 2201.

7. It appears from plaintiff's testimony that the cause, the motive which induced him to transfer certain lottery stock, was false, unlawful, contrary to moral conduct and to public order. The contract by which he transferred the stock was therefore unlawful. *Ex turpi causa non oritur actio*. C. C. 1779, 1893, 1895-11. The Court will not lend its aid to settle disputes relative to such contracts, will notice their illegality *ex-officio*, and allow it to be suggested without any plea and at any stage of the proceedings. 12 Ann. 219; 13 Ann. 209; 3 N. S. 46; 17 La. 132; 2 R. 271; 1 Ann. 176; 12 Ann. 166; 5 R. 106; 19 La. 409; 9 R. 486, 491; 2 Ann. 60, 66; 6 Ann. 317, 320.
8. The evidence and pleadings considered as a whole disclose no cause of action.
 - State demands are entitled to no favor, must be supported by peculiarly strong and convincing evidence and established with more than reasonable certainty. 7 Ann. 565, 562; 14 Ann. 317; 10 Ann. 279; 35 Ann. 1006; 9 Ann. 234; 2 La. 481; 6 La. 31, 674; *Etting vs. Marx, Ex'r.*, 4 Federal Reporter, 681.
10. Admissions by one deceased proved by witnesses who cannot be contradicted, much less convicted of perjury, is the weakest kind of evidence, scarcely entitled to any belief. 7 R. 112; 9 La. 562; 11 La. 129; 8 Ann. 307, 278; 14 Ann. 274; 37 Ann. 873.
11. The testimony of witnesses will have no weight if intrinsically improbable. 29 Ann. 764; 37 Ann. 95; 35 Ann. 1006; 9 Cranch, 71; 18 Wall. 91; 12 Peters, 262.

The opinion of the Court was delivered by

WATKINS, J. This suit is for the recovery of two hundred shares of the capital stock of the Louisiana State Lottery Company from the defendants.

The claim of the plaintiff is that, on the 26th of October, 1874, he transferred, on the books of the company, said shares of stock to D. D. Smith, without consideration; and that said transfer was made upon the friendly advice of one George L. Smith, who suggested to him that, being engaged in politics, and necessarily absent from the city a large portion of the time, he would be unable to manage the stock to an advantage, and that it would be better that it should be placed under his control. He further advised him that, for his own convenience, it should be placed in the name of D. D. Smith, a trustworthy and responsible person; and that it was so done.

He represents that George L. Smith executed and delivered to him a receipt for the stock, at the time, in which he obliged himself to return it on call; all of which was to the knowledge of D. D. Smith, who undertook to administer same accordingly.

That George L. Smith died on the 9th of July, 1884, without having caused said stock to be returned. That he demanded the stock and its dividends of D. D. Smith, whereupon he paid \$2500 on account of the dividends, but refused to surrender the stock.

The answer is that G. L. Smith assigned to D. D. Smith 425 shares

Antoine vs. Smith et al.

of the stock of said company, which he then owned, and informed him of the fact; that thereupon D. D. Smith went to the office of the company and procured the certificates therefor; and that he was not informed, and did not know how, when or from whom George L. Smith procured the same.

He avers that he was not advised and did not know that Antoine had any interest in the stock; and that he did not undertake to administer it for him.

That soon after the death of George L. Smith, Antoine called to see him, and claimed of him (D. D. Smith) *some* of the shares of stock, alleging himself the owner thereof, and threatened suit for the same; and though he did not believe he had any interest in the stock—in order to avoid a lawsuit and to buy his peace—he gave him \$2600, in consideration whereof Antoine relinquished all claim to any interest in the stock standing in his (D. D. Smith's) name; and also relinquished all claims of any kind against the estate of George L. Smith.

The defendants are D. D. Smith and the heirs of G. L. Smith, who have accepted his succession unconditionally, and have been placed in possession thereof.

On the trial the defendants plead the agreement referred to in their respective answers, "as a transaction, and compromise, which had and has, as against said Antoine, and the claims and demands by him asserted herein, the force and effect of *res judicata*;" and they plead it as a peremptory exception; and as a bar to plaintiff's action.

This plea having been overruled they plead same agreement as a release, executed by the plaintiff, which he could not revoke at will, and urged it as a bar to the demands of Antoine.

On these issues the parties went to trial, and from a judgment in favor of the defendants, the plaintiff appealed.

I.

It is well that the testimony of the plaintiff and that of some of his witnesses should be examined and analyzed, in order that a fair understanding may be had of the incipency of this *singular* transaction, and that we may be the better enabled to judge of the rightfulness of plaintiff's claim. This is deemed necessary for the especial reason that one of the principal actors died several years before suit was brought, and the filing of it occurred nearly fifteen years after the alleged transfer of the stock.

Indeed, defendant's first exception was that plaintiffs' demand was stale and prescribed by five and ten years.

Antoine vs. Smith et als.

The following is a synopsis of the statement of Antoine, as a witness in his own behalf, in so far as it bears on that part of his case, viz:

That he and George L. Smith were close, confidential friends from the time they entered politics in 1868 to the time of the latter's death in 1884.

That there were many and large money transactions between them. For instance, Smith being tax collector, speculated in plaintiff salary warrants, and realized sometimes as much as \$3000 or \$4000 in profits for his (plaintiff's) account.

That he purchased the 200 shares of lottery stock in controversy, on the 31st of March, 1873, from Charles T. Howard, at 60 cents on the dollar—i. e., \$12,000. That about eighteen months afterwards Smith came to him and said that they—Antoine and himself—had better transfer this stock.

Using his own words, he says:

"He said that both of us was engaged in politics—he was then running for Congressman, or member of the Legislature. We were in politics, both of us. I don't recollect exactly, but his remarks were, 'We are both engaged in politics, and that it would not do to have the stock in our name. He said that more especially myself, as I was Lieutenant Governor, and President of the Senate; that questions in regard to the charter of the Lottery Company might come up, and that, in case of a tie vote, I would naturally have to have to vote on it; and, probably, my vote might be challenged.' And he suggested that we should transfer our stock in the name of his cousin, Dexter. * * * "He said Dexter—meaning David Dexter Smith—is as honest as the days are long. He says, 'I will manage the stock for you, and invest (the dividends) in stocks, bonds and other securities; and when we are out of politics, we will start a savings bank; you shall be president, and I a member of the board of directors.'"

He says that the transfer was made at the lottery office, when no one was present, other than George L. Smith. That the purchase of this stock was suggested to him by Mr. Kelso. Smith transferred, at the same time, his 225 shares to D. D. Smith. But the latter was not present. He says Smith gave him a receipt for his stock, but he kept no account with Smith.

To use his own words, he says:

"Well, there were usually no accounts kept between us of our business. Mr. Smith he always put all our business on the high ground of mutual confidence. That is the way he, more or less, dealt with me."

He says that, from time to time, he obtained from him *what money he wanted*.

Quoting :

Q. "Do you know how much you got?"

A. "Well, I don't know exactly. I can approximate. I suppose I must have got altogether from him, after the stock was transferred—I must have got about \$5300, or \$5400," etc.

This gentleman, Mr. Antoine, was a delegate from Caddo parish to the Constitutional Convention of 1868, and afterwards he represented that parish in the State Senate until 1872, when he was elected Lieutenant Governor. He held that office until 1876, a period of time embracing all of these transactions.

As further illustrated of the history of that epoch, and particularly of the part the plaintiff took therein—and which has a significant bearing on this controversy—it is well to invite attention to the various financial adventures on which he entered in the *interim*.

When he first "went into politics" he was the proprietor of a barber shop in the city of Shreveport.

A few years afterwards he engaged in the cotton factorage business in this city, in partnership with P. B. S. Pinchback; acquired an interest in a newspaper establishment; had a grocery store, and purchased and operated a small plantation in Caddo parish. He also purchased some city lots in Shreveport, and a \$13,000 residence in this city. This in addition to the \$12,000 he paid for the lottery stock.

We cannot refrain from expressing some surprise at the auspicious good fortune that seemed to attend his efforts, whereby his hitherto slender income and limited means had yielded such a comfortable little fortune within so few years!

Money matters appeared to have been so easy with him that he could loan a friend a thousand dollars, payable on call.

He says :

"I loaned him (Dr. Pemberton) \$1000, just on his word, and he returned it."

Mr. George Z. Kelso, one of plaintiff's witnesses, gives his version of the transaction in reference to this stock. He says :

"In January, 1873, I had 200 shares of lottery stock put aside for me, and when the time expired for me to take it up, I wasn't able to take it up, and I advised Mr. Antoine to take it. * * I went with Mr. Antoine to the party and told the party Mr. Antoine would take the shares in my place.

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" Question. Who was the party ?

" Answer. Mr. Charley Howard.

" Q. Did you see the money paid ?

" A. I saw Mr. Antoine give him a roll of bills ; he counted it and said it was correct, and gave him the certificate."

On cross-examination the following was elicited, viz :

" Q. You say that you had 200 shares of Louisiana Lottery stock put aside for you ?

" A. Yes, sir.

" Q. Who put it aside for you ?

" A. Mr. Howard.

" Q. The president of the Louisiana Lottery Company ?

" A. Yes, sir. I had bought some stock previous to that. A party came to me in 1869 and told me that he could get me 300 shares at 15 cents. He went out and only returned with 50 shares ; but I paid him 20 cents. I lost my stock with a broker—a friend of mine—and Mr. Howard, as a friend of mine, told me he *would put aside* 200 shares for me, at a certain figure.

" Q. That is the stock you referred to ?

" A. Yes, sir.

* * * * *

" Q. Mr. Howard then suggested that he would put aside 200 shares for you ?

" A. He asked me if I was tired of the stock—that it was good stock. Mr. Charley wasn't friendly to the party who had my stock, and I went and seen the party. I saw Mr. Howard afterwards, and I told him *I was friendly to his institution*, and I told him I would take 200 shares at a certain figure, provided he would wait on me. He said he would keep it for me for 50 days. At that time I failed to take it up, and I seen Mr. Antoine and gave him the benefit of it."

This is the history of this stock, as detailed in the evidence of the plaintiff, Antoine, and his principal witness, Kelso—the former Lieutenant Governor at the time, and the latter State Senator.

On the faith of these declarations as to the source and origin of the plaintiff's title and the character and avowed object of his dealings with George L. Smith, and through which he traces his title, defendant's counsel insist that it is manifestly a contract that is tainted, and reprobated in law as in good morals, and for the enforcement of which he has no right or cause of action against the defendant.

He further insists that it is the duty of courts of justice to vindicate and maintain the sanctity of their proceedings before they proceed to

Antoine vs. Smith et als.

the consideration of the merits of a case, and that, in the instant case, the *cause* of the contract and the *motive* of its transfer are in themselves intrinsically illegal, false and unlawful, and opposed to good morals and public policy.

That such contracts cannot be enforced has been held in very many opinions of this Court and its predecessors is evidenced by the following cases: 5 Ann. 18, Denton vs. Erwin; 3 N. S. 46, Mulholland vs. Voorhies; 17 La. 132, Gerooby vs. Caneby; 2 R. 271, Davis vs. Caldwell; 1 Ann. 176, Davis vs. Holbrook; 12 Ann. 166, State vs. Lazarre; 5 R. 106, Slidell vs. Pritchard; 9 R. 486, M. Ins. Co. vs. New Orleans; 2 Ann. 60, Denton vs. Wilcox; 6 Ann. 317, Denton vs. Erwin; 38 Ann. 634, Gloin vs. Taylor.

But, however much we may reprobate such scandalous transactions; however much we may feel constrained, for decency's sake, to summarily eject the plaintiff from the portals of the temple of justice, it is our deliberate opinion that it cannot be done in the present attitude of this affair.

Fortunately, the *regime* in which such abuses were possible, has long since terminated and passed into history, and the people who were instrumental in bringing it about have passed from the stage of action. George L. Smith is dead, and the plaintiff has ceased to be Lieutenant Governor; D. D. Smith is no longer the representative of George L. Smith, but he is representing his heirs. There stands on the books of the Lottery Company 290 shares of its capital stock, to which *one* of the parties is entitled, irrespective of the fraud and speculation that may have characterized the transactions, through which its issuance and transfer were procured.

We understand this to be the jurisprudence established on that subject by the Supreme Court. In Brooks vs. Martin, 2 Wallace, 80, that great Court employs this striking language, viz:

"There was then, in the hands of the defendant, lands, money, notes and mortgages, the results of the partnership business, the original capital for which plaintiff had advanced.

"It is to have an account of these funds and a division of these proceeds that this bill is filed. Does it lie in the mouth of the partner who has, by fraudulent means, obtained possession and control of all these funds, to refuse to do equity to his other partners, because of the wrong *originally* done, or intended, to the soldier? * * *

"The title to the land is not rendered void by the statute. It interposes no obstacle to the collection of the notes and mortgages.

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The transactions which were illegal have become *accomplished facts* and cannot be affected by any action of the Court in this case."

This opinion was most carefully and deliberately expressed after a thorough review of the best American and English cases on the subject, and the doctrine meets our unqualified approval. Our decree must rest on different grounds.

II.

The plea of *res judicata* urged by the defendant's counsel rests on the following instrument:

"NEW ORLEANS, September 4th, 1884.

"In consideration for a note from David Dexter Smith, dated September 4th, 1884, for twenty-four hundred dollars (\$2400), the surrender of a note which the said Smith holds against me for one hundred dollars, dated September 13th, 1876, and one hundred dollars in cash, I hereby surrender all claims I have to any Louisiana State Lottery stock on the books of said company in the name of David Dexter Smith. I further agree to relinquish all claims and considerations in every form against the estate of the late George L. Smith, deceased, also to pay any balance, if called for, that the estate of said Smith might be liable for by said George L. Smith's signature to my bond as treasurer of the School Board for the city of Shreveport, parish of Caddo, State of Louisiana. This being a receipt in full for all demands in any form against the estate of the late George L. Smith, deceased, also any and all claims in any form against David Dexter Smith.

C. C. ANTOINE."

The signature is admitted to be that of the plaintiff. It is not disavowed in the plaintiff's pleadings, notwithstanding his counsel filed *one* supplemental petition subsequent to the filing of defendants' answer, to which said agreement was annexed, and of which it was made a part.

The provisions of the code are that "a transaction, or compromise, is an agreement between two or more persons who, for preventing or putting an end to a law suit, adjust their differences by mutual consent, in the manner which they agree on, and which every one of them prefers to the hope of gaining, balanced by the danger of losing. This contract *must* be reduced to writing." R. C. C. 3071.

Our learned brother of the district court declined to give effect *as a compromise* to the agreement in question, because it did not contain the phrase, "for preventing or putting an end to a law suit."

In *Calhoun vs. Lane*, 39 Ann. 596, we gave effect to an instrument as a compromise, which did not contain these formal words. We can see

no good reason why their use should be deemed *essential*. Under our liberal system of practice, nothing is sacramental as a matter of form, unless expressly so declared by statute. The instrument does not contain the phrase, "and which every one prefers to the hope of gaining, balanced by the danger of losing," which would seem to be equally important.

In our view, the only *essential*, as a matter of form, which the article duoted requires is that "the contract *must* be reduced to writing."

Without recapitulating the terms, provisions and conditions of the instrument, we hold it to be a transaction, or compromise, in the sense of the code, and was evidently intended for the purpose of *preventing* law suit.

A transaction has "a force equal to the authority of things adjudged." R. C. C. 3078.

"A thing adjudged is said of that which has been decided by a final judgment, from which there can be no appeal, either because the appeal did not lie, or because the time fixed for appealing is elapsed, or because it has been affirmed on appeal." R. C. C. 3556, No. 31.

Under this view of the case we are dispensed from the consideration of a mass of testimony that is, in the main, conflicting and quite unsatisfactory, and the recital of which could only serve to fortify and strengthen the conclusion at which we have arrived.

III.

While the only plea plaintiff, as a witness in his own behalf, *could* set up was that he did not read the instrument when it was presented for his signature, and that he signed it thinking it a receipt, his learned counsel argue against the effect of it *as* a compromise, because—

1. Of the disproportion of the amount Antoined received and the value of the stock.
2. Because advantage was taken of his necessitous circumstances.

The law provides that a compromise cannot "be attacked on account of error in law, or any lesion." R. C. C. 3078.

In *Davis vs. Lee*, 20 Ann. 248, the Court said that "in transactions, as they are defined in the code, and in the Roman law, there is, from the nature of such contracts, something aleatory."

Pothier, in treating on this subject, says :

"There are certain agreements in which persons of full age are *not* entitled to restitution, be the injury *ever so considerable*. Such are compromises according to the edict of Francis II. These are agreements respecting pretensions upon which there are impending, or

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expec'ed, litigations. * * * By the very nature of such agreements, the intention of the parties is the avoidance of litigation, even at the expense of what belongs to them." 1 Pothier Ob., p. 121 (36).

In *Long vs. Robinson*, 5 Ann. 627, the Court said :

"The plaintiff seems to rely to establish both (of his demands) by the *large amount of his claim compared with the small sum of \$3000, for which they were compromised*. But the code expressly provides, that a compromise cannot be annulled on account of any lesion—Art. 3045; because it is an agreement to put an end to a law suit, and which the parties prefer to the hope of gaining, balanced by the danger of losing. Code 3038.

"The plaintiff is, therefore, not only unfounded in the opinion, that the sacrifice he made in the compromise is cause for its rescission, but the district court properly refused to admit testimony of the value of the property and claims compromised by him."

There is no proof in the record that any advantage was sought or obtained of Antoine's embarrassed financial situation.

He it was who sought an interview with D. D. Smith, *at once* he ascertained that George L. Smith was dead; and, without ceremony, threatened him with a law suit because he declined to yield to his demands. Immediately afterwards he sent a lawyer to him. During the ten days' delay allowed for a conference with the heirs, who resided in a distant State, he *voluntarily accepted \$2600 in settlement* of his claims, whatever they were. His financial situation was not discussed. It did not constitute a factor in the settlement. No proof shows that D. D. Smith, or the heirs, knew anything of his embarrassment financially.

The fact that Antoine did forbear, during all these years, to prefer any claim, judicially, against his alleged confidential friend, while living; his *immediate* action after his death; the fact that when the \$2600 was procured he remained in contented silence for near three years before this suit was filed, and then filed it without any admonition whatever to D. D. Smith, or the heirs; and the fact that he does mainly rely upon his *own* testimony to evade the effect of his written relinquishment, place him in a doubtful and unenviable light before this Court.

IV.

The further argument is made that, *as a compromise*, the instrument so-called cannot be given effect, because the transaction alleged to have been compromised possessed *no element of doubt*.

To this a sufficient reply is made by the judgment pronounced by

Succession of Dumestre.

our learned and conscientious brother of the lower court, who *saw* the witnesses and *heard* them testify. And, notwithstanding the lips of George L. Smith were sealed in death, and the plaintiff produced a number of witnesses by whose evidence, to bolster up his cause, he manifestly disbelieved their story, and rejected his demands.

While we do not rest our decree upon the same grounds as did the judge *a quo*, it is quite likely that if we should, it would be the same.

Judgment affirmed.

No. 10,095.

SUCCESSION OF MRS. B. E. DUMESTRE.

Although a purchaser may be protected by the order of a court directing a sale in a matter over which it has jurisdiction, yet he has the right to inquire into the validity of the proceedings and conducive to the order of sale, to ascertain whether, under the showing made, the court had the power to make the order.

His refusal to comply with the adjudication may be justified whenever the order of sale and the proceedings instituted to procure it are on the face of the papers unwarranted by law.

An order of sale of the entire property of a succession, inherited by minor and major heirs, to pay the debts and to settle the claims and interest of the latter, can be assimilated neither to a sale asked by an administrator, nor to one to effect a partition, nor to one of minor's property.

No more can a tutor administering a succession than an administrator ask and obtain the sale of more property than is necessary to pay the debts.

A tutor can undertake the settlement of a succession only when it accrues exclusively his wards.

A judgment to operate a partition by sale can be validly rendered only on proof that the property cannot be conveniently divided in kind.

Property belonging exclusively to minors can be ordered to be sold only on compliance with the requirements of the law on the subject.

A court having probate jurisdiction has no power to order the sale of *all* the property of a succession, inherited by minor and major heirs, at the instance of the tutor, with the consent of the latter, to pay debts which hardly amount to two-fifths of the estimated value of the property and to settle the interest of the major heirs.

Enough property must first be sold to pay the debts, and the residue accruing to such heirs may then form the object of a partition, in kind, or by sale, on proper proceedings and proof.

In such case a court cannot decree the partition by sale, unless, on proof, that the property cannot be conveniently divided in kind.

An order of court for the sale of succession property, which is not justified by the face of the papers, is illegal and can be successfully resisted by an adjudicatee refusing compliance with his bid on property offered for sale.

An adjudicatee cannot be compelled to accept a title tendered under such circumstances, and has a right to demand reimbursement of the cash paid by him to the auctioneer at the moment of adjudication.

40	571
44	50
44	428
40	571
46	128
40	571
47	1686
40	571
4110	834
40	571
120	486

A PPEAL from the Civil District Court, Parish of Orleans.
Voorhies, J.

B. C. Elliott for Plaintiff and Appellee:

I.

A purchaser at a probate sale, which is a judicial sale, is not bound to look beyond the decree and the jurisdiction of the court. *Hennen's Digest*, p. 1494.

II.

A valid and indefeasible title is given by a sale ordered by a competent court on the petition of a tutor administering a succession, acting under the advice and direction of a family meeting, the object of the sale being to pay the debts of the succession. The major heirs, who are also creditors of the deceased, joining in the petition for a sale. *Nesom vs. Weiss*, 34 Ann. 1004.

James Timony for Defendant and Appellant:

1. A purchaser at a public sale is not bound to comply with the adjudication when the title is clouded with doubts and dangerous complications.
2. The tutor's acts, even when sanctioned with advice and counsel of a family meeting, are only valid when in conformity with the law.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The question presented is: Whether the adjudicatee of certain property belonging to this succession shall be *compelled* to comply with his bid.

The ground of resistance is, that the proceeding by which the order of sale was obtained and the order itself are unwarranted, and, as such, null, and that, therefore, no title has passed to the adjudicatee.

Mrs. Dumestre died leaving minor and major heirs and owning property inventoried at \$24,000. She was indebted to third parties in about \$6000, and, it is alleged, to her major heirs some \$4000.

A dative tutor was appointed to the minor children and he was relieved from furnishing security.

He undertook the settlement of the succession and, to that end, doing that which an administrator could have done and even more, he presented a petition alleging the debts and that, for the purpose of paying them and settling with the major heirs, the whole or part of the property ought to be sold.

A family meeting was called and fixed the terms of the sale, and the heirs of age assented.

By the same order, the deliberations were homologated and the entire property was ordered to be sold.

It was offered and realized \$21,746, part being withdrawn.

It is apparent, from this condition of things, that the sale was asked either exclusively to pay debts, or also to effect a partition.

Succession of Dumestre.

If it was to pay debts aggregating at most \$10,000, there was no necessity, no propriety, no authority, to order the sale of \$24,000 worth of property, and the order must be deemed *ultra vires* of the court.

If the sale was ordered to effect a partition, besides, the forms of law have not been observed and the order is likewise a nullity.

So that, in either case, the order of sale was unwarranted and the execution of it has not stripped the minors of their undivided share therein. Forcing the adjudicatee to comply with her bid is to compel her to give her money for property to which a voidable or doubtful title is tendered.

The safest test for the validity of the sale is to ascertain the precise nature or character of the proceedings which provoked it.

They were designed either to obtain the sale of the succession property to pay the debts, or to effect a partition, or the sale of minor's property as an act of tutorship.

If intended to pay debts, they must be controlled by the law and the jurisprudence on that subject, and could ignore the heirs.

If intended to operate a partition, they should be conducted under the provisions of the code in that respect.

If intended to accomplish a sale of minor's property, and only in that case, they should comply with provisions Arts. 339 *et seq.*, R. C. C.

(a) Tested by the fundamental allegation of the petition, which is that the sale was necessary to pay the debts of the succession, the conclusion is warranted that the object in view was to pay debts, by the tutor administering the succession. In such case, the sale could not be sustained, as they were two heirs of age, and the tutor could not control the succession as an entity; for it is well established, that a tutor can *ex-officio* administer a succession only where it accrues *exclusively* to his wards.

(b) If the proceedings are to be treated as contemplating a partition, it is apparent that the minors, for whom the law accepts a succession under benefit of inventory, had *then* no standing, for the plain reason, that the succession was not liquidated, was burdened with debts, and the property could be the object of a partition only after such liquidation had been effected.

(c) If the tutor proposed to make a sale under Arts. 339 *et seq.*, R. C. C., he is denied that right, as the minors were not then the sole or exclusive owners of the property, to which they had only an undivided share, the value of which could not be ascertained before a

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complete administration and liquidation of the succession. *Richard vs. Denée*, 11 R. 518.

It will not do to say that a purchaser has no right to look beyond the decree ordering the sale, when it is rendered by a competent court, for it is settled that he must look not only to the jurisdiction of the court, but also inquire into the power of the court to make the order of sale.

When he discovers, on the face of the proceedings, at least those conducive to the sale and which serve as a foundation for the order of sale, illegalities calculated to throw a cloud on the title tendered, he may successfully refuse compliance with the adjudication.

If he were to be held protected by the *mere* order, then he could be forced to take title to the property of minors, ordered to be sold without the consent of a family meeting, or without any previous appraisement, or without any reason being assigned to justify the sale. R. C. C. 340.

Surely such is not the law.

There is no precedent to show that a purchaser ever was compelled to take a title under such circumstances.

In the case of the Succession of Gassen *vs. Palfrey*, 9 Ann. 560, in which a purchaser had refused to comply and was relieved, the Court substantially said :

There is yet for him a *locus penitentia* and the presumption *omne rite acta*, etc., created for his protection, cannot estop him, though it be available to throw on him the burden of proof. He can always successfully resist, when the title tendered is, if not void, at least voidable.

In the case of *McCulloch vs. Holmes*, N. R., No. 4672, decided in 1857, O. B. 27, fol. 240, and alluded to in *McCulloch vs. Weaver*, 14 Ann. 33, in which the Court had ordered the sale of property belonging to minor and major heirs on an *ex parte* proceeding and without a formal judgment of partition, a purchaser was relieved from compliance with his bid on property at the sale.

It is true that there were exceptions in the case which had not been disposed of before the order of sale had been rendered.

In the case in 14 Ann. 33, just mentioned, an adjudicatee, at the same sale, under the same order, was quieted in a suit brought by the administrator to annul the sale, and this because he had gone into possession and his title could be subsequently ratified.

In the present case, the adjudicatee is not attacking the order of sale collaterally. He charges its nullity on its face, because the petition

Succession of Dumestre.

and the deliberations of the family meeting, which form part of it expressly, do not justify the order. His objections are founded on the proceedings on their face.

The court, no doubt, had jurisdiction over the succession and over the minors. It had authority to order the sale of part of the property to pay the debts, but it had none to order the sale of the *entire* property, as it did.

Property sufficient to pay the debts, even what is said to be due the major heirs, ought to have been *first* ordered to be sold, and this once done, the rest of the property would have remained unincumbered, the common property of the heirs, who, if unwilling to hold in indivision, might then have asked a partition, either in kind or by licitation.

Before ordering a sale of property held in common by minors with majors, the Court must be satisfied, either by the reports of experts, or by satisfactory evidence, that the property cannot be divided in kind, for it is the policy of the law, in its jealousy for the protection of minors, that they should rather own real estate than that they should have money or securities, which would be by their nature more imperilled than if invested in such property.

There is nothing to show, in these proceedings, not even an obligation, either in the petition or in the proces verbal of the deliberations of the family meeting, that the property cannot be divided in kind, conveniently, among the heirs.

It is well observed by the judicious counsel for the resisting purchaser: "If the method pursued; in this case be legal, all the safeguards thrown around the interest of minors by the forms prescribed are utterly useless."

The proceedings leading to the order of sale have none of the features of a partition, although it was one in disguise, intended to operate as such; but even if it was regular in its form, the absence of proof of the impossibility of convenient division in kind would not have justified the judgment of sale.

Under the circumstances, the purchaser cannot be *compelled* to take the title offered.

The adjudicatee has prayed that the amount deposited by her with auctioneer be returned to her. She is clearly entitled to have it back.

It is therefore ordered and decreed that the judgment appealed from be reversed, and it is now ordered and decreed that the rule herein taken to compel compliance with the adjudication be discharged

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and that the defendant therein recover the amount deposited by her with the auctioneer, namely: Six hundred and twenty-two dollars and fifty cents (\$622.50) and costs in both courts.

Rehearing refused.

DISSENTING OPINION.

FENNER, J. The decedent, Mrs. Dumestre, left, as her sole heirs, ten children, two of whom were majors and the other eight minors.

Arthur Gastinel having been recommended by a family meeting as dative tutor of the minors, presented a petition praying for an inventory of all the property of said minors, which was ordered accordingly.

Their property consisted exclusively of their interest in the estate of their deceased mother, and the inventory embraced all the property of said deceased.

After filing and homologation of the inventory, Gastinel was duly appointed and qualified as dative tutor.

He thereupon presented a petition to the court, solely in his capacity as tutor, representing "that the inventory shows that the property of the minors consists in the main of real estate, in which their co-heirs (the two major children) have an undivided interest; that besides the minors' mortgage of \$15,204.32, there are other debts due by deceased amounting to upwards of \$6000 that it is necessary to sell the whole or a part of said estate in order to pay the debts of deceased and settle the claims and interest of the major heirs; that as to the terms of sale and other matters, he desires the advice of a family meeting," etc. A family meeting was accordingly ordered and held, which, with the approval of the under-tutor, recommended the sale of all the property at public auction on the terms therein fixed.

The proceedings of the family meeting were presented to and duly homologated by the judge, and the tutor prayed for an order of sale in conformity therewith, which prayer was, in writing, concurred in by the two major heirs. Thereupon the judge made his order as follows: "In accordance with the advice of the family meeting and the concurrence of the major heirs herein, let the entire property of the succession of Mrs. B. E. Dumestre be sold," etc.

The sale was accordingly made and Mrs. Delia Joyce became the adjudicatee of part of the property. She declined to accept the title and to comply with the terms of the adjudication, and her present appeal is taken from a judgment ordering her to comply.

Her objection is based on the allegation contained in the petition for

Succession of Dumestre.

sale that it is necessary "in order to pay the debts of the deceased to settle the claims and interest of the major heirs." They contend that the latter clause converts the proceeding into a partition sale, and that, as such, it is null and void for want of compliance with the requirements of the law in the conduct of partition proceedings.

Her apprehensions as to the defectiveness of the title tendered are in my opinion groundless.

This is not an administrator's sale as to which it is settled that an administrator has no right to provoke a sale for the mere purpose of effecting a partition between heirs, when there is no necessity therefor for the payment of debts. *Hebert vs. Hebert*, 22 Ann. 309; *Hotchkiss vs. Dodd*, 13 La. 86; *Pipkin vs. Thompson*, 14 La. 272; *Bank vs. Delery*, 2 Ann. 648; *Succession Morgan*, 12 Ann. 153; *Monition of Dickson*, 6 Ann.

Even if it were an administrator's sale, however, it might find protection under the doctrine of a recent case in which we held that where the petition alleged a necessity for the sale in order to pay debts it would not be invalidated because accompanied by a further suggestion as to its necessity also for settlement between the heirs. *Nesom vs. Weis*, 34 Ann. 1004; see also *succession of Weber*, 16 Ann. 420.

But, as said before, this is not an administrator's sale. The tutor has not acted as administrator, either actual or constructive. As his wards were not the sole heirs, he could not have authority to assume administration of the whole succession. He has scrupulously confined his official action within the limits of his authority as tutor, extending it only to the interest of the minors. While the sale of the remaining interest is expressly based, both by himself and the judge, upon the concurrence of the major heirs.

Who, then, can assail the title tendered to appellant? Not the creditors for whose payment the sale is expressly made. Certainly not the major heirs, who are *sui juris* and have joined in provoking the sale.

We have, then, only to consider whether the sale is binding as divesting the interest of the minors.

Of this there can be no doubt. The proceedings comply strictly with every requirement imposed by the law for a valid sale of minors' property. These requirements are prescribed by Articles 339, 340, 341 and 342 of the Civil Code, and are, substantially, as follows:

1. That a family meeting shall advise the sale as advantageous to the minors. This has been done

2. That the judge should, on consideration, approve the advice of

the family meeting, and fix the terms and other conditions of the sale. This he has done.

3. That the sale should be made at public auction after due advertisement. This was fully complied with.

4. That the property should not be sold for less than the appraised value as shown in the inventory. The price here was considerably larger than the appraisal. There are no other requirements prescribed by law, and, these being complied with, the minors are fully concluded.

Under such proceedings the minors' undivided interest in the property might have been validly sold separately. The advantage derived by the minors from a sale of the whole property, under the consent of the major heirs, is evident.

Neither appellant nor we, under her appeal, are concerned with the reasons of the family meeting for advising the sale, or of the judge for approving them and ordering it. It is sufficient that the family meeting, the tutor, the under-tutor and the judge have, in the exercise of the discretion vested in them by law, concurred in the sale, and that it has been made in compliance with all legal requirements.

Even considering this as a proceeding for partition, a close study of the codal provisions on that subject reveals no valid objection to the sale here made. The sale is not a partition, but only a step preliminary thereto, and the actual partition and the proceedings in reference thereto take place upon the proceeds, and are subsequent matters with which appellant has no concern. *Dees vs. Tilden*, 2 Ann. 412; *Kohn vs. March*, 3 Rob. 48.

The Code gives to every heir the right to demand a partition. R. C. C. 1289, 1307.

Tutors of minors have the right to sue for a partition, provided they are thereunto authorized by the judge on the advice of a family meeting. R. C. C. 1235; *Rachal vs. Rachal*, 10 La. 458; *Segur vs. Sorel*, 11 La. 446.

Minors who do not demand a partition *inter se* of the share they are to receive, may be properly represented by their common tutor. *Succ. of Aiguillard*, 13 Ann. 97.

The first thing to be determined in a judicial partition is how it shall be made, whether in kind or by licitation or sale.

The Code gives to each heir the privilege of claiming his share in kind, Art. 1337, but it does not require an heir to make such claim.

If a tutor, with the concurrence of a family meeting and the approval of the judge, concludes that it is for the advantage of the

Maguire vs. Maguire.

minors that the partition should be made by sale, he would have the right to urge that it be so made, and if the major co-heirs concurred in the same view, then there would be no controversy, and the judge, also concurring, would surely be authorized to order the sale.

The Code invests the judge with full authority and discretion to determine this question. Art. 1339. *Kohn vs. March*, 3 Rob. 48.

In his order of sale, he would be required, on the advice of a family meeting, to fix the terms of credit and security. Art. 1341.

Now, in the instant case, we find the tutor of the minors, the under-tutor, the judge and the major co-heirs all concurring that the property should be sold. It has been sold under judicial order, at public auction, on terms of credit fixed on the advice of a family meeting, and has brought a price exceeding the appraisement. What requirement of a valid sale, even for partition, is lacking, is not apparent.

In a former case we said: "We think the law exhibits sufficient watchfulness over the interest of minors in the granting of such orders, in requiring, first, an application by the tutor usually supposed to be concerned for the interest of his wards; second, a reference to a meeting of their relatives and friends to consider, advise and report for or against it; third, the action of their under-tutor, specially appointed to protect their interests against any improper action of their tutor; fourth, the final approval of the judge with all the prior proceedings before him." *Tutorship of McCormick's heirs*, 32 Ann. 958.

These requisites concur in the instant case. It is obvious that upon new proceedings presenting the same conditions, a re-sale may be had, and I can see no reason for subjecting the minors to this unnecessary expense and to the additional detriment of losing the advantage of a bargain which would not be litigated by the purchaser if it were not to his interest to be let out of it.

I, therefore, dissent from the opinion and decree herein.

No. 10,167.

MARIA MAGUIRE VS. PATRICK J. MAGUIRE.

40	579
51	57
40	579
111	800
111	400

A husband who signs an act of sale of property to his wife containing the declaration that she purchases with her own separate paraphernal funds and for herself, is estopped from contesting this admission.

A wife is entitled to recover from her husband, in a suit for a settlement of the community, the proceeds of property belonging to her, used for purposes of the community.

Maguire vs. Maguire.

A PPEAL from the Civil District Court for the Parish of Orleans,
Houston, J.

J. Timony for Plaintiff and Appellee :

A husband who has been a party to an act of purchase in which it is declared that the price belonged to the wife in her parphernal right, and that the property is to be such cannot afterwards contradict it.

Charles Louque and Henry L. Lazarus for Defendant and Appellant.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is a suit for a separation from bed and board for a settlement of the community and for reeovery of a sum of \$14,000 claimed by the plaintiff to be due her. The answer is a *general* denial.

There was judgment for the separation, with which both parties declare themselves satisfied, and which neither proposes to disturb.

The judgment further recognizes title in the plaintiff to certain real estate and her right to one thousand dollars.

From this judgment the defendant appeals.

The act of sale of the real estate was made by one Davey, in the name of the plaintiff, assisted by the defendant, her husband.

It contains the formal declaration that the Mrs. Maguire was purchasing with her own private and separate funds and as her paraphernal property *for herself*, her heirs and assigns.

The sale purports to have been made for \$3000—\$500 cash and the rest in two notes of \$1250 each.

On the trial the plaintiff exhibited the two notes, and the defendant undertook to introduce evidence having a tendency to show title to the property in the community.

On objection by plaintiff's counsel, the Court received the testimony to show collection of certain rents by the plaintiff, with a view, no doubt, to hold her accountable for the same, in some way.

We find in the record an admission that the sale of Davey to Mrs. Maguire declares that she paid five hundred dollars of her separate and paraphernal property, that the admission is made under the advice of counsel, because the defendant signed the act and is estopped from questioning it as between himself and his wife.

Still, in the argument and in the brief, on behalf of the defendant, it is contended that the property belongs to the community.

Maguire vs. Maguire.

It therefore becomes necessary to pass upon the question of title asserted by both parties.

In the case of *Kirwin vs. Hibernia Insurance Company*, 35 Ann. 33, the question of estoppel was fully examined and the ruling was that, under the circumstances, which are similar to those in the present, 'he husband could not go behind his formal attestation.

In the matter of the succession of *Dejean* and of *Gaudet vs. Gauthreaux*, recently decided, this construction of the law was sanctioned and acted upon.

It therefore follows that the defendant cannot be permitted to assert title in the community to the property claimed by the plaintiff as her own.

The testimony adduced to show collection of rents or moneys by the plaintiff has failed to satisfy the district judge, as it does us, that she has received any, for which she can be held liable. In fact, the defendant specifies no amount and asks no particular relief under that feature of the case.

The only matter remaining for consideration is that portion of the judgment which allows the plaintiff to recover one thousand dollars from the defendant.

It appears that this sum is the price at which certain property standing in the name of one *Coyle*, but owned by plaintiff, was sold to one *Fletcher*.

The lower judge who heard the testimony which we have reviewed, was satisfied that the amount had been used for purposes of the community which was to that extent benefitted by it. There exists no reasonable doubt that it was not so, and we do not feel authorized to disturb his finding.

Judgment affirmed.

CONCURRING OPINION.

FENNER, J. Considering that there is no suggestion of any interest of community creditors or of forced heirs involved in this controversy, and that the judgment herein would not be binding on such heirs or creditors, who are not parties; considering further that the five hundred dollars paid in cash, admitted to be the paraphernal funds of the wife, was the whole price actually paid for the property, and that there is no question of any payment made or liability incurred by the husband or the community on account of any credit portion of the price; and considering, therefore, that the property bought by Mrs. Maguire

State ex rel. Maspereau vs. Batt, Register, et al.

from Davey was actually bought and paid for in full with paraphernal funds, I can see no reason why the defendant should be permitted to contradict his positive admissions in the authentic act that the property was the separate paraphernal property of his wife. Under repeated adjudications his simple heirs would be estopped from contradicting such authentic admissions made by him, and, *a fortiori*, does the same estoppel apply to him. 35 Ann. 33; 34 Ann. 374; 33 Ann. 688; 31 Ann. 124; 30 Ann. 1036; 9 Ann. 242.

For these reasons, I concur.

POCHÉ, J. I concur in the additional reasons given by Mr. Justice Fenner.

No. 10,148.

STATE EX REL. MRS. SERAPHINE MASPEREAU VS. JOSEPH BATT, REGISTER, ET AL.

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A mandamus will not lie to compel the Register of Conveyances of the parish of Orleans to erase from the record of his office a tax deed, in the absence of a final judgment of a competent court declaring the nullity of the tax sale, not even if the purchaser at such tax sale is made party to the proceeding.

A previous judgment declaring the assessment under which such tax sale was made absolutely void, is not binding on the purchaser at such sale if not a party to the suit in which the judgment was rendered.

A PPEAL from the Civil District Court, Parish of Orleans
Voorkies, J.

Farrar & Kruttschnitt for Plaintiff and Appellee:

I.

- (a) The tax sale of property under an assessment in the name of one not the owner, is an absolute nullity. *Maspero vs. New Orleans*, 38 Ann. 401; *Lagne vs. Boagni*, 32 Ann. 912-913; *Denegre vs. Gérac & Francez*, 35 Ann. 932.
- (b) The constitutional provision that tax deeds shall be "received by courts as *prima facie* valid sales," merely establishes a new rule of evidence, and not new rights. *Cooley on Taxation*, 2d Ed. pp. 517, *et seq.*

II.

A writ of mandamus will lie to compel the erasure of such a conveyance from the records of the conveyance office.

That such a writ will lie in the case of a mortgage is held in: *Savage vs. Holmes*, 15 Ann. 334; *State ex rel. Deblieux vs. Recorder*, 25 Ann. 61; *Lanauz vs. Recorder*, 36 Ann. 975.

Why not, then, in case of a conveyance?

State ex rel. Masperoan vs. Batt. Register, et al.

Jos. H. & J. Zach. Spearing for Defendants and Appellants :

1. It is elementary that persons are not bound by judgments in cases to which they were not parties, and the judgment in Maspero vs. N. O. (38 Ann 401) is not *res adjudicata* as against respondents,
2. All deeds of sale for taxes under Article 210 of the Constitution and laws passed in pursuance thereof, are *prima facie* valid, and no sale whatever of property for such taxes can be decreed void for any cause of alleged nullity, except in a direct action. A mandamus does not lie to cause the inscription in the conveyance office of a deed of sale for the State tax of 1883, to be cancelled. Article 210 of the Constitution of 1879; Lannes vs. Bank, 29 Ann. 112 to 115; Jurey & Gillis vs. Allison, 30 Ann. 1225; Fix vs. Herron, 29 Ann. 8-0; High on Extraordinary Remedies, Section 10.
3. A sale under Article 210 of the Constitution cannot be attacked on any ground, except upon a tender of the "price paid" by the purchaser to the tax collector. Miller vs. Montague, 32 Ann. 1292.
4. An assessment or sale of property in the name of a person not the owner, even when made under a law requiring the same to be in the name of the owner, is not an "absolute nullity." A mistake of assessing property in the name of one not the owner, though the law requires the same to be in the name of the owner, is a matter relating to the manner of assessment and not to the fact of assessment. The name in which property should be assessed and sold is a non-essential in tax proceedings; that is a matter within legislative control, and, therefore, a mistake in the name does not render the sale an absolute nullity. Shannon vs. Lane, 33 Ann. 489 to 492; Geren vs. Graber, 26 Ann. 694; Morris vs. Lalaurie, 39 Ann. 53; Kent vs. Brown, 38 Ann. 806; 29 How. 433; Woodside vs. Wilson, 33 Penn. Stat. 54; Strauch vs. Shoemaker, 1 Watts & Sergt 175; 13 Penn. Stat. 154; Grady vs. Barneshel, 23 Cal. 287; Witherspoon vs. Duncan, 4 Wall. 217; Easton vs. Perry, 37 Iowa, 683.

The opinion of the Court was delivered by

TODD, J. This is a mandamus proceeding directed against the Register of Conveyances for the parish of Orleans to compel him to cancel from the records of his office a tax deed to certain immovable property claimed by the relatrix to have been illegally sold to one Hakengso, who is also cited as a party to the proceeding.

From a judgment making the mandamus peremptory, the defendants have appealed.

The defendants excepted to the proceeding in the lower court on many grounds, which summarized, were substantially in effect that a mandamus would not lie in such a case and for the purpose declared in the petition. The exception was overruled and a long answer to the merits filed, asserting the validity of the tax sale and a legal title acquired thereby by the purchaser at such sale.

A bare statement of the object of the suit and of the nature of the pleadings is, in itself, almost, if not quite sufficient, to show that the remedy resorted to in this instance was not the proper one.

The tax sale in question was made in 1884.

Article 210 of the State Constitution declares: "All deeds of sale

State ex rel. Maspereau vs. Batt, Register, et al.

made, or that may be made, by collectors of taxes shall be received by the courts in evidence as *prima facie* valid sales."

The same article further provides that "No sale of property for taxes shall be annulled for any informality in the pleading, until the price paid, with ten per cent interest, be tendered to the purchaser."

With these mandatory provisions in the Constitution, it cannot readily be conceded that this officer—the Register of Conveyances—can, in the discharge of a mere ministerial duty, erase from the records of his office a deed which is declared by the Constitution *prima facie* valid; or, if not valid, one that cannot be annulled for any informality until the price, with interest, is tendered to the purchaser!

Had the relatrix presented to this officer a final judgment of a competent court, contradictorily rendered against the purchaser at the tax sale, declaring the sale void, then he might have been compelled by mandamus to perform the ministerial duty by cancelling the deed, in case he had refused to do so.

Nor could such judgment be rendered in a mandamus proceeding. The issues that are presented by the pleadings in the instant case, are a complete demonstration of this fact. The defendant, or the party holding the tax title assailed, is entitled to have these issues tried and determined in a regular suit, by ordinary proceeding, and with the right, if he desires, to claim it, to submit these issues to a trial by jury. This is a constitutional right which this extraordinary proceeding is calculated to deprive him of.

It is, however, urged by the counsel of the relatrix that in the case of Maspereau vs. New Orleans et al. (38 Ann. 401), it was decided by this Court, on appeal, that the assessment of the property under which this sale was made was absolutely void. In answer to that, it is sufficient to say that neither the Register of Conveyances nor Hakengos, the present defendants before us, were parties to that suit, and, therefore, as to them, it was as if it never existed.

The law has expressly provided for relief by mandamus, but this proceeding does not come within the scope of any of the provisions pertaining to this remedy. C. P. Art. 829, *et seq*; Fix vs. Herion, 20 Ann. 850.

It is, therefore, ordered, adjudged and decreed that the judgment of the lower court be annulled, avoided and reversed, and that the mandamus be refused, at the cost of the relatrix.

Saloy vs. Woods.

No. 10,166.

B. SALOY VS. JAMES WOODS.

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The provision in the present State Constitution directing the collection of taxes otherwise than by suit, was not self-operative; hence, a suit for a city tax instituted and prosecuted before the legislative act was passed to carry into effect the said provision, operated to interrupt prescription against the tax. *City vs. Wood & Bro.*, re-affirmed, 34 Ann. 733.

An assessment on merchandise or money at interest does not, though duly recorded, operate as a privilege on the immovables of the tax payers under Act 77 of 1880. See Section 24 of said act.

Act 95 of 1882, fixing the term of prescription against tax mortgages and privileges at five years, does not contravene Art. 175 of the Constitution; nor does the provision in that article, as to the time within which privileges shall be recorded, apply to tax privileges.

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

Charles Louque for Plaintiff and Appellant.

J. Ward Gurley for City of New Orleans, Third Opponent and Appellee.

The opinion of the Court was delivered by

TODD, J. Plaintiff caused certain immovable property, situated in the city of New Orleans, to be sold under executory process to enforce the payment of a mortgage thereon.

The city, by third opposition, claimed to be paid by preference out of the proceeds of sale of the city taxes for the years 1882, 1883, 1884, 1885, 1886 and 1887, assessed against the defendant.

From a judgment in favor of the city, maintaining the opposition for the full amount claimed, the plaintiff has appealed.

I.

Against the tax and tax privilege of 1882, the prescription of three and five years is pleaded.

This question must be governed by the revenue act (771 of 1880). The 24th section of that act provides: "That taxes, tax mortgages and tax privileges shall be prescribed by three years from the date of filing the tax roll in the office of the recorder of mortgages." The tax roll was so filed on the 14th of July, 1883, and the city's opposition, claiming the tax, was instituted on the 20th of September, 1887.

There was, however, a suit instituted for the recovery of the tax in 1882, which interrupted prescription.

The counsel for plaintiff, however, contends that this suit did not interrupt prescription, because of the constitutional inhibition (Art.

Saloy vs. Woods.

401) against this method of collecting taxes. It was held by this Court in *City vs. Wood & Bro.*, 34 Ann. 732, and *Mayer vs. Hyman*, 35 Ann. 301, that this inhibition did not become operative until rendered so by subsequent legislation. Therefore, the suit was effective to interrupt prescription, and the claim was not barred.

II.

As relates to the taxes of 1883 and 1884, prescription must be determined by Act 95 of 1882. Section 34 of that act changes the prescriptive term, with respect to taxes, tax mortgages, etc., from three to five years.

The taxes were recorded in the mortgage office respectively July 31, 1884, and February 24, 1885. Prescription, therefore, had not run when the opposition was filed.

The plaintiff, however, claims that the question of prescription relating to these taxes must be governed by Act 176 of the Constitution, under which it is contended the prescription term is fixed at three years, and without reference to the date of record. In the case of *Davidson vs. Lindop*, 36 Ann. 765, this Court held otherwise, and to that decision we still adhere.

Nor does the requirement contained in that article, as to the time within which privileges must be recorded, apply to privileges for taxes.

It is, however, shown that part of the tax of 1884 resulted from an assessment of money, at interest, and merchandise amounting to \$5000.

Of course, this assessment did not operate as a privilege on the real estate of the tax-payer. Therefore, the amount of the tax on this item must be rejected as a charge upon said proceeds. Two per cent on \$5000 is just \$100, which must be deducted from amount allowed in the judgment below. Sec. 24, Act 77 of 1880.

For the same reason a deduction of \$50 must be made from the city tax of 1886. The tax of this year (1886), save in this respect, is not objected to, and the tax of 1885 is admitted to be correct.

III.

We find in the record no tax bill of 1887. It is mentioned in the note of evidence, but neither the bill was filed nor any evidence relating to it was introduced. The amount of the tax for this year must, therefore, be rejected.

This completes the review of all matters embraced in the appeal,

City of New Orleans vs. Railroad Company.

and from the conclusions announced, the judgment will have to be amended.

It is, therefore, ordered, adjudged and decreed that the judgment of the lower court be amended as follows :

That \$100 be deducted from the amount allowed for tax of 1884, and the further sum of \$50 be deducted from the tax allowed for 1886.

That the tax of 1887 on the claim of privilege therefor be dismissed as of non-suit.

That the judgment, as thus amended, be affirmed, the appellee to pay the costs of appeal.

No. 21,536.

CITY OF NEW ORLEANS VS. NEW ORLEANS CITY AND LAKE RAILROAD
COMPANY.

Operating a street railroad by horse and steam is a *business* within the meaning of the law which can be subjected to the payment of a license, under Act 101 of 1886 and city Ordinance 3035.

A contract conferring the right to lay rails to operate a street railway, without dispensing from the payment of a license, is not impaired by the exaction of such license.

A PPEAL from the Civil District Court, Parish of Orleans.
Rightor, J.

Francis B. Lee, Assistant City Attorney, for Plaintiff and Appellee.

Braughn, Buck, Dinkelspiel & Hart for Defendant and Appellant.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The plaintiff sues to recover \$2500 and interest from the defendant, as a license for the year 1887 for carrying on, within the city limits, the business of operating and running a horse and steam railway, for the transportation of passengers.

The defenses are :

1. That Act No. 101 of 1886, which authorizes the city to levy the license tax, is unconstitutional, because the license is unequal and not graduated, as is required by Art. 206 of the Constitution, as it provides a different grade for cities, according to their population.

2. That, if this defense is not well founded, then that the license tax

City of New Orleans vs. Railroad Company.

cannot be recovered, because the business is not a trade, profession, avocation or calling in the sense of the law, but is simply the exercise of a privilege accorded, for consideration, to use the streets and highways of the city for street railroad purposes; that the enforcement of the ordinance, under which the license is claimed, will impair the obligations of the contract entered into in 1879 between the city and the company, and that this impairment violates both the Federal and State Constitutions.

I.

The first defense is formally abandoned by the company, on consideration of the ruling in *State vs. O'Hara*, 36 Ann. 94, as settling the question.

II.

In relation to the second defense, it may suffice to observe :

1. That the act of 1886 expressly recognizes and declares that, carrying on, operating or running any horse or steam railroad, or both, for the transportation of passengers, within the limits of any city, is a *business*, and that, after so saying, the act proceeds to graduate the license.

2. That the privilege conceded by the city, by the contract of 1879, to the company, was intended merely to confer the right to lay rails and do all necessary work, on the streets designated, to enable the grantee to exercise the right of way to operate a street railway.

From the language of the act, it is clear and it follows, that the operating of a street railroad is a *business*, and, as such, chargeable with a license.

The privilege of the right of way, is what is termed a franchise, which, when granted, becomes *property*, susceptible of incumbrance and conveyance. *Board vs. New Orleans*, 32 Ann. 915; *N. O. vs. R. R. Co.*, 34 Ann. 1228, and same, 114 U. S. 505.

It is, therefore, well distinguishable from the privilege of enjoying that right, which is vivified only on the payment of the proper license to the city, under the terms of Act 101 of 1886, p. 175 (9th and following class), on which Ordinance 2035, C. S., sued under, is made to rest.

It is further clear, that, as the contract of 1879 does not grant the privilege of using or exercising the right of way, *free* from any license, the exaction of one, does not impair the obligation of the contract.

The district judge ruled correctly.

Judgment affirmed.

 State vs. Wright.

No. 10,173.

STATE OF LOUISIANA VS. GEORGE C. WRIGHT.

In criminal cases the cross-examination of a witness must be confined to the matters stated by him in his direct examination, or closely connected therewith.

Where, in a prosecution for murder, it was proved that the accused went into the room where the killing occurred with a drawn pistol, he (the accused) may be asked when on the stand as a witness what his intention was at the time he entered the room.

Where, upon the trial, there was testimony to the effect that the killing was accidental, the trial judge is not justified in refusing to charge the jury on the subject of accidental killing, and of negligence or non-negligence connected therewith upon the ground that he did not believe the evidence. *State vs. Tucker*, 38 Ann. 536, reaffirmed.

A PPEAL from the Criminal District Court, Parish of Orleans.
Roman, J.

M. J. Cunningham, Attorney General, for the State.

On cross-examination a witness for the defense may be interrogated upon any question incidental to the facts and circumstances testified to on his direct examination. 35 Ann. 1015; 36 Ann. 573.

W. L. Evans for Defendant and Appellant:

A witness called by defendant was cross-examined on matter not connected with the matter stated in her direct examination; notwithstanding the timely objection of defendant's counsel. This was error. *State vs. Swayzie*, 30 Ann. 1397.

"A party, when examined as a witness, may be asked as to his motives or intentions, when these are material." *Whart. Cr. Ev.*, 8th Ed., § 431 and authorities there cited. *Whart. Cr. Ev.*, § 456.

"It is the judge's duty to charge the law applicable to any state of facts supported by evidence, whether he believes or attaches value to such evidence or not." *State vs. Tucker*. 38 Ann. 540, 791.

The sufficiency or insufficiency of the evidence is for the jury alone. *State vs. White*, 35 Ann. 97; *State vs. Breckinbridge*, 33 Ann. 312.

The opinion of the Court was delivered by

TODD, J. The defendant appeals from a sentence of ten years' imprisonment at hard labor, imposed after conviction of manslaughter on an indictment for murder.

The grounds upon which he rests his appeal are presented by several bills of exception found in the record.

I.

The first exception was taken to the ruling of the court permitting the Attorney General to interrogate a witness for the defense, on his cross-examination, touching a matter about which he had not been asked nor testified in his direct examination.

We gather from the bill of exceptions and the reasons assigned by

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State vs. Wright.

the trial judge the following facts connected with the ruling complained of.

The witness, Mrs. Dehan, had testified, on her direct examination, that on the day the homicide occurred she was employed as a servant at the house wherein the killing took place; that in the house there was a bar-room; in the rear of the bar-room a hall, and in the rear of the hall a dining-room.

That she was standing at the door leading from the hall into the bar-room; that she saw the deceased open that door, cross the hall, knock three times at the dining-room door, which was opened to him by his sister, the wife of the accused.

That harsh words passed between the deceased and his sister; he abused her, and told her he had come for some pictures. That the accused, who was at breakfast, rose from his seat, asked the accused to be more guarded in his language towards his (accused's) wife, and sharp words were then exchanged between them.

That the wife of the accused then said to the deceased, "Stop that fuss and I will get the pictures." That she left the dining-room and went up stairs, leaving the parties in the dining-room. From there she passed into the yard, and on her return to the hall she saw the accused going to the bar-room with a pistol in his hand.

There the direct examination stopped. On the cross-examination she was asked, substantially, to state what occurred then in the bar-room between the accused and the deceased—whether she heard the report of a pistol, and who fired it.

Thereupon counsel for the accused objected to the questions, his objection being (quoting):

"That the State attorney has no right to cross-examine any witness for the defendant except as to facts and circumstances connected with the matters stated in the direct examination."

The objection was overruled and the answers of the witness admitted, for reasons assigned by the judge, to the effect that the questions and answers of the witness were closely connected with the facts stated on her direct examination, and, "further, that the ends of justice would be subserved by allowing the witness to state fully all she knew in relation to the case."

It is an elementary principle of the criminal law, and one often recognized in our jurisprudence, that a witness can only be cross-examined on the subject matter of his examination in chief, or on something closely connected therewith, or, as stated by Greenleaf:

"The rule is now considered by the Supreme Court of the United

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States, to be well established, that a party has no right to cross-examine any witness except as to facts and circumstances connected with the matters *stated* in his direct examination."

This dictum, though not now applicable to civil cases, still rules in criminal cases. *Roscoe*, Crim. Ev. 173; *Archibald*, Crim. Pleadings, 157; *State vs. Lacombe*, 12 Ann. 196; *State vs. Denis*, 19 Ann. 119; *State vs. Swayzie*, 1823.

One of the reasons assigned by the trial judge for his ruling admitting the evidence was (quoting): "That the ends of justice could be best subserved by allowing the witness to state fully all she knew in relation to the case before us." An apt reply to this is to be found in the decisions cited above, 19 Ann. 119, from which we quote:

"The discretion which is claimed for courts to relax, to change or to utterly disregard the rules of criminal evidence which the Legislature has decreed obligatory, would effectually make the law a dead letter. Cases might occur wherein a relaxation of the rule might serve to advance the course of justice, but this is no reason why the general rules of evidence should not be observed, and until the law of evidence in criminal proceedings is changed, our courts are not justified in disregarding rules of evidence. It was well said by Lord Kenyon that "Rules of evidence are of vast importance to all orders and degrees of men, and that our lives, our liberty and our property are concerned in support of them."

The only remaining question on this point is whether the questions to the witness, allowed by the judge, are obnoxious to this rule—in other words, were they closely "connected with the facts *stated* in the direct examination," which is the test of their admissibility under the rule quoted.

We note that the witness in the direct examination testified exclusively to what occurred before the killing, in the hall and dining-room, to-wit:

That the deceased came from the bar-room into the hall, passed through the hall, knocked at the door of the dining-room, abused his sister, who opened the door for him, was remonstrated with by the accused, and after sharp words had passed, and after she had left the hall a moment, and returned to it, saw the accused with a pistol going into the bar-room. Not a word was she asked as to what passed in the bar-room, or about any conflict or struggle between the parties or about the firing of a pistol or anything, in short, about the killing.

The vital points in the prosecution were, of course, the fact of the killing and shooting, and the person who did it. These vital facts

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upon which the witness and the defendant's attorney had been wholly silent, the State's counsel attempted to prove by her—i. e., to establish the crime charged against the prisoner by the cross-examination of his own witness, who had not uttered a word about the commission of the deed. This was utterly unwarranted. It was giving a latitude to a cross-examination which the law does not tolerate.

II.

The accused, sworn as a witness in his own behalf, was asked "what his intention was at the time he entered the bar-room," where the killing took place.

The question was objected to substantially on the ground that it was not competent for the accused to show his intention at that time, and that he had stated his intention, or the intention actuating him, at the moment the firing took place. The objection was sustained and the witness not permitted to answer.

It had been shown by the the testimony of a previous witness that the accused had crossed the hall and entered the door of the bar-room with a pistol in his hand. Of course, therefore, the inquiry as to intention actuating the accused when he entered that room where the shot was fired and the killing done, was a vital one. In truth, the intent is the very essence of the offense. Before an accused was made a competent witness, the intent was left to be inferred from acts committed and proved, but the intent—the actual intent—with which an act is done is no less a fact than the act itself, but he alone who commits it, knows and can tell the intent with which it was committed. When an accused was made a competent witness his competency was as unrestricted as that of any other witness, and we know of no law or legal principle that would debar an accused from testifying to his intent or motive, where such intent or motive was material and altogether a proper subject of enquiry.

It frequently becomes important in criminal trials to ascertain the state of feeling—the partiality or prejudice of a witness—and the usual way of ascertaining this is by direct inquiry to the witness and his answer to such inquiry. This course is just as free from objection when applied to the accused as a witness. The judge, therefore, was in error in refusing to permit the question to be answered. Wharton, *Crim. Ev.*, 8th Ed., Sec. 431.

III.

The counsel for the accused asked the court to give the jury several special charges concerning the right of self-defense. This the

Succession of Vollmer.

court refused to do, one of the reasons for such refusal being that in his written charge to the jury he had already charged the jury substantially to the same effect as asked in the special charges requested.

From an examination of the record we are satisfied the reason of the judge's refusal to give the special charges requested was well founded.

IV.

Another charge was asked, couched in the words following:

"A person who unintentionally and non-negligently, when doing a lawful act, kills another is to be acquitted."

This is a correct enunciation of the law. Wharton on Homicide, Sec. 470.

The trial judge, however, refused to give it because it was inapplicable under the real facts of the case.

In the assigning of the reasons for his refusal to so charge, he states that there was evidence adduced at the trial that the accused "had not discharged the pistol at the deceased, but that it had gone off by accident and unintentionally," but that he (judge) did not believe it.

If there was such evidence, and whether the judge believed it or not, under the rule laid down by the present court in the case of *State vs. Tucker*, 38 Ann. 536, 791, the refusal to give the charge was error.

These conclusions reached upon the several questions above presented compelled us to remand the case.

It is therefore ordered, adjudged and decreed that the verdict of the jury and the sentence thereon appealed from be annulled and set aside and the case be remanded to the lower court to be proceeded with according to law.

No. 10,146.

SUCCESSION OF JOHANNA VOLLMER.

ON PETITION FOR NULLITY OF WILL, ETC.

An act of adoption executed since 1872, before a notary public, by husband and wife, with the consent of the widowed mother of the child, is valid, though not authorized by judicial sanction.

The Act of 1872, No. 31, providing for the manner of adopting children, dispenses with the judicial permission, previously required by the Act of 1865, No. 48. A notarial act is the only act now required.

The recital, in a nuncupative will by public act, that the officiating witnesses are competent, does not satisfy the exigency of the law, which requires the statement in the act that they are residents of the place wherein the will is executed.

The act must, on its face, make full proof of the facts constituting the competency of the witnesses in that respect, and show the observance of all the essential formalities required to be fulfilled.

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 Succession of Vollmer.

The notary is not authorized to judge of the competency of the witnesses and dispense himself from stating the facts constituting that competency. He must state those facts and express in what manner the required formalities were fulfilled.

The omission to declare those facts cannot be supplemented and renders the will invalid. Husbands and wives cannot prescribe against each other.

A PPEAL from the Civil District Court, Parish of Orleans.
Houston, J.

Jos. H. & J. Zach. Spearing for Tobias Vollmer, Defendant and Appellant:

In order for a person to be legally adopted, it is necessary that the authority of the court should first be obtained. The execution of an act of adoption before a notary without other formality does not constitute a legal adoption. Act No. 48 of 1865: R. S., Secs. 2322 to 2328; Article 214 of R. C. C.; Succession of Hoesser, 37 Ann. 840.

A wife who renounces the community, loses all sort of right thereto. R. C. C. 2411.

Unless a divorced wife applies within ten days from the rendition of the judgment of divorce for an inventory of the community property and formally accepts the community within thirty days, she is presumed to have renounced the same. The presumption of law is against the wife accepting the community, unless it affirmatively appears that she accepted the same. R. C. C. 2420, (2469), 2519, (2398); Herman vs. Theurer, 11 Ann. 70 to 72; Audrich vs. Lamothe, 12 Ann. 77; Succession of Ewing vs. Altmeyer, 15 Ann. 416.

A judgment of divorce dissolves the community then existing, and a subsequent marriage of the divorced spouses creates a new community and is not a continuation of the community which was dissolved by the judgment of divorce.

The declaration of the notary in a will by public act that the will was executed, etc., in the presence of A, B and C, "competent witnesses," is a compliance with the law, and such a testament will not be annulled because the notary failed also to state that the said "competent witnesses resided in the parish." State vs. Martin, 2 Ann. 715; Sterlin vs. Gros, 5 L. 105; Chardon's Heirs vs. Bongue, 9 L. 458, 468; Thibodeaux vs. Voorhies, 25 Ann. 480.

Braughn, Buck, Dinkelspiel & Hart for Plaintiff and Appellee.

No syllabus, but quoted the following authorities: Buddig vs. Baldwin, 38 Ann. 385; Lillenthal vs. Succession of Hoesser, 35 Ann. 839; LeBlanc vs. Burras, 16 L. 80, and Swift vs. Swift, 9 Ann. 118.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The object of this suit is to recover the entirety of the Succession of the deceased.

To that end, the plaintiff alleges that she was legally adopted by the deceased and her husband, Tobias Vollmer, and thus acquired all the rights vested by law in legitimate descendants; that Johanna Vollmer has departed this life, without issue, or forced heirs, leaving a will by public act, by which she institutes her husband her universal legatee; that said will is a nullity, in not stating that the officiating witnesses are *residents* of the place; that she is consequently entitled to all the property of which Johanna Vollmer died possessed.

The defenses are: That the plaintiff has no standing in court in

this, that the act whereby she claims to have been adopted, is a nullity, for the reason that it was executed without judicial authority, which was an essential condition precedent; that the will is valid, as it recites that the witnesses to it are *competent* and that the plaintiff has no greater rights than the deceased, through whom she claims, and who had forfeited all claims against the community, for reasons which it is needless to state.

From an adverse judgment, Tobias Vollmer appeals.

It appears that on August 11th, 1875, by authentic act, Tobias Vollmer and Johanna Brestinchiner, his wife, adopted Magaret Ann Kelly, born on July 15, 1867, conferring expressly upon her, all the rights of a legitimate child in their respective successions, subject to the rights of forced heirs, and that the mother of the child, Widow Michael Kelly, consented.

The act does not recite that judicial authority was previously obtained for its execution, and hence, it is charged, that the failure to have procured the permission is destructive of the adoption.

I.

The question therefore arises: Was this omission fatal to the validity of the act; or, in other words, has the Act of 1865, No. 48, which stipulated that such authorization should be obtained, been or not repealed in that respect.

Several acts were subsequently passed on the subject of adoption, before and after the Revised Code, which itself contains legislation on the matter.

The Act of 1865 was expressly amended by Act 17 of 1867, which provides that persons having legitimate children may adopt any other child, *provided* the adoption shall not interfere with the rights of the forced heirs.

It was again expressly amended by Act 64 of 1868, to confer exclusive jurisdiction on parish courts outside of the parish of Orleans and to authorize, when the person adopted is a minor, the surrender of the entire paternal authority to the adoptor.

This act of 1865, with its amendments, was incorporated in the Revised Statutes as Sections 2323 to 2328, both inclusive.

The Revised Code contains supplemental provisions. R. C. C. 214,

It prohibits the adoption of illegitimate children, whose acknowledgment it forbids; such adoption not to interfere with the rights of forced heirs.

Succession of Vollmer.

It provides, that the person adopting shall be at least forty years of age, and at least fifteen years older than the person adopted.

It confers on the person adopted all the rights of a legitimate child in the estate of the person adopting him, except as above stated.

It requires the concurrence of married persons to adopt a child, saying that one cannot adopt without the consent of the other.

In 1872, by Act No. 31, it was provided, that any person *above* the age of twenty-one years shall have the right, by act to be passed before any parish recorder or notary public, to adopt any child *under* the age of twenty-one, *provided* that, if such child have a parent, or parents, or tutor, the concurrence of such shall be obtained, who, and as evidence, shall be required to sign the act.

It is apparent, from an inspection of those various laws that, at the date of the last act, there must have existed some confusion in the mind, touching the *forms* to be followed in cases of adoption, and it must have been for the purpose of dispelling all doubt on the subject that the Legislature passed the just mentioned act.

That act surely had some object in view, otherwise it would not have been passed.

It evidently contemplated a change of the provisions in the Revised Code, Art. 214, in this, that it does away with the conditions that the adopting person should be at least forty years of age and fifteen years older than the adopted one, by providing that any person *above* twenty-one years may adopt any one *under* that age.

It further contemplated some legislation on the subject of consent, to be given by the parents, parent, or tutor of the minor to be adopted.

That act consists of one section only, and does not contain any repealing clause of anterior laws, in conflict with it, or on the same subject matter.

The absence of such clause is easily accounted for. The Legislature did not intend to modify anterior laws on adoption in all respects. It proposed to leave intact all that portion of the legislation concerning the substance, such as the rights of the adopted persons and the qualifications of the adoptors, except as the question of age, and designed, beyond this, to simplify the matters of form to be gone through, by requiring merely a notarial act and dispensing with the judicial sanction previously exacted, as indispensable.

The Constitution of 1868 required that the object or objects of an act should be expressed in its title.

Hence it is natural enough, in order to ascertain what the object of

Succession of Vollmer.

the act of 1872 was, to consider its title, which is "An act providing for the manner of adopting children."

The word "*manner*" is clearly demonstrative that the purpose of the law was to provide for the form to be used for the adoption of minors.

It is then apparent that, as the act does not allude to the judicial authority previously demanded, that ceremony was abandoned and suppressed, and another one, plainer and less expensive, was substituted to it.

In the case presented in the Succession of Hosser, 37 Ann. 840, there was no issue as to the *form* of the act. It was passed in 1866, in the year following the act of 1865, which required judicial sanction. If obtained since 1872, judicial authority would be surplusage.

The act of adoption levelled against here must, therefore, stand.

II.

The second question presented relates to the validity of the will, which is in the nuncupative form by public act.

The charge against it, is, that it does not set forth that the three witnesses are *residents* of the parish of Orleans, but that they are *competent* witnesses.

The omission is fatal. The notary is required by law, under pain of nullity of the act, to express specifically every material fact constituting the competency of himself and of the officiating witnesses under the law, in that respect, and also every formality observed in the execution of the will. The act must make full proof on its face of every element necessary to its validity, as no evidence is admissible to supply any deficiency. The notary is not constituted a judge of the legal fulfillment of these formalities, otherwise it would suffice for him to state that the will was executed after observance of all legal exigencies, but this would be a plain violation of the law. R. C. C. 1578, 1595; Leblanc vs. Burras, 16 L. 80; Swift vs. Swift, 9 Ann. 118; Shannon vs. Shannon, 16 Ann. 9; Succession of Whittington, 26 Ann. 89; Succession of Carroll, 28 Ann. 388; Devoll vs. Balms, 20 Ann. 203; Succession of Wilkin, 21 Ann. 115; Thibodeaux vs. Voorhies, 25 Ann. 480; Laurent 23, p. 262; Duranton 9, 112; Merlin Tem. Instr.; Toullier 5, p. 451.

The will being deficient in an essential particular, is a nullity and must be so regarded and treated.

III.

The plaintiff having established that she was legally adopted by Mrs. Vollmer, and that the will left by her is a nullity, it follows that

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she has inherited all the property which she died owning, as completely as if born of her body. 37 Ann. 840.

IV.

Questions have been raised antagonistical to the rights of the deceased in the community which existed between her and her husband, to the effect that she did not, within the time fixed by law (thirty or sixty days), accept that community, and that, by such failure, she has forfeited all claims to what might have been her share therein, otherwise.

It appears that Tobias Vollmer and Johanna Brestinchiner (the deceased) first contracted marriage in December, 1858; that they were subsequently divorced, June 10, 1885; and that shortly afterwards, in July following, but within thirty days, they married again, the wife dying some time later, without having, before her second marriage, accepted the community.

We deem it unnecessary to pass upon those questions to any considerable extent.

It suffices to say that the second marriage, having been contracted within the time during which, it is claimed, that the community should have been accepted, after the judgment of divorce, it has suspended all prescription, as, husbands and wives cannot prescribe against each other. R. C. C. 3523.

Judgment affirmed.

No. 10,182.

STATE EX REL. W. I. O'DONNELL vs. HON. A. L. TISSOT AND W. T.

HOUSTON, JUDGES CIVIL DISTRICT COURT.

The Constitution of the State makes each house of the General Assembly the sole judge of the qualifications, election and return of its members. Consequently, the district courts are without jurisdiction to determine contested elections touching the right to seats or membership in the Legislature.

Nor have they the power to take the depositions of witnesses relating to such contest, nor the authority to cause the ballot-boxes to be produced in court and the seals placed thereon by the commissioners of election, to remove the boxes and have the ballots recounted.

Judges can exercise other than a strictly judicial powers. They cannot combine with such powers those that properly pertain only to the duties of a commissioner to examine witnesses and take in writing their depositions for the purpose of forwarding them to another tribunal.

State ex rel. O'Donnell vs. Judges.

A APPLICATION for Certiorari and Prohibition.

Aug. Bernan for Relator :

Cited the following authorities. Art. 23 Const. 1879; 31 Ann. 123, *Redon vs. Spearing*; *Barbin vs. Secretary of State*, 32 Ann. 579; Art. 92 Const. 1879; *Elliott vs. Peersol*, 1 Peters, 341; *United States vs. Terrena*, 13 Howard, 40; *McCrary on Elections*, 257, 382, 383.

A. Goldthwaite for Respondents :

Cited the following authorities: R. S. Secs. 1386, 1431, 1432, 1433 and 1434; State ex rel. Ford vs. Miltenberger, 33 Ann. 266; Act 57 of 1877, and Art. 440, C. P.

The opinion of the Court was delivered by

TODD, J. This is an application for writs of certiorari and prohibition.

The relator represents, substantially :

That he was a candidate at the recent election for the Legislature (House of Representatives) from the Third Ward of the city of New Orleans, on the regular Democratic ticket, and was elected over his opponents, Otto Helman, William Mehle and Charles B. Wilson, the two first-named the candidates of the "Young Men's Democratic Association," and the latter on the Republican ticket.

That he was declared elected by the commissioners of election and returns to the election promulgated by the returning officer showed his election.

That the said defeated candidates have filed petitions in the Civil District Court contesting relator's election. That the suits of Mehle and Wilson were allotted to Division B of said court and of Helman to Division A.

That the said contestants admit the election of relator in the face of the returns, but insist that a recount of the votes would show a different result; that they have cited relator into said court and have asked that the returns, showing relator's election, be revoked, and that they (contestants) be declared elected.

The relator further avers that he filed a plea to the jurisdiction of the court or its power to entertain said suits, but the respondent judges overruled the plea, have taken jurisdiction, have appointed a day for taking testimony in the suits, have issued subpoenas *duces tecum*, commanding the clerk of the Criminal District Court, the custodian of the ballot-boxes, to produce the boxes, returns, tally-sheets, etc., in open court, and that it is the intention to break the seals placed on said ballot-boxes by the commissioners of election, to have the ballots

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again counted by those not authorized to do so. It was charged that such action on the part of the judges was arbitrary, and involved usurpation of authority, and was in contravention of the Constitution and laws of the State.

The respondent judges, in their answer, whilst admitting that the exclusive power is vested in the General Assembly to judge of the qualifications, election and returns of its members, allege that these proceedings before them do not infringe upon this legislative prerogative, that it is a proceeding such as is known as a proceeding to perpetuate testimony and to assist the Legislature to dispose of these election contests more speedily, and that it is not their purpose to interfere with the custody of the ballot-boxes.

Article 23 of the present State Constitution provides that "each House shall judge of the qualifications, election and return of its own members."

In the face of this provision it requires no argument to show that the courts have no power to judge or determine with regard to these essentials.

That is, that it is manifest that in so far as the judges have been asked by these contestants to determine the contests and annul the returns already made in favor of relator, and declare the contestants duly and legally elected, they have not the shadow of authority to do so.

Therefore, that part of the petition of these contestants that invokes the exercise of judicial authority in these respects must be eliminated from the controversy. The respondents do not, in fact, claim such power; but, as intimated before, they seem to limit their authority to the production of the ballot-boxes, the removal of the seals therefrom, the recounting of the ballots, and the examination of witnesses for the purpose of assisting the Legislature in the final determination of these contests; and we do not understand the counsel of the contestants, in their oral and written arguments before this Court, to claim more than this.

But have these judges authority to go even this far? In these contested election suits instituted and pending before them, does their power and jurisdiction extend over any matter pertaining to such suits, such, for instance, as is claimed, of compelling the custodian of the ballot-boxes to bring the boxes into court; to have seals, placed thereon by prescribed authority, removed, the boxes opened, and the ballots manipulated and counted by persons other than the law has designated and depositions taken with respect to these matters? That is the question we have to determine.

The provision, quoted from the present Constitution, "that each House shall judge of the qualifications, election and returns of its members," appears in every State Constitution that precedes the present one. But in these preceding Constitutions this provision is followed by the words (quoting): "but a contested election shall be determined in such manner as shall be described by law."

The suppression of these words in the present Constitution is not without meaning and significance. What is the inference to be drawn from it?

Evidently, it was to give emphasis to the declaration that each House was to judge of the qualifications, election and returns of its members by stripping it of any restriction or condition that could limit its scope or impair its full force, and to make each House, in truth and in fact, in all cases and under all circumstances, the judge and the sole judge of all matters pertaining to the election of its members.

Those qualifying words found in the previous Constitutions were the sole warrants for contests before the courts relating to elections for members of the General Assembly.

In 1814 an act was passed, the provisions of which are embodied in Sections 1431, 1432 and 1433 of the Revised Statutes, which authorized pleadings before the courts, inaugurating, as it were, contests to be subsequently conducted and determined by the Legislature, and providing for the taking of depositions of witnesses, to be used in such contests, etc. It is under these provisions, and also under a proviso in Sec. 1386, it is to be presumed, that this proceeding before us for review was instituted. It was legislation that could not be deemed objectionable under the former Constitutions, but, on the contrary, might be construed as necessary to a strict conformity with the provision referred to, looking to contested elections relating to membership in the General Assembly.

But these provisions, and none others that we can find, confer power or authority on the judges to determine the contests and adjudge and declare the result of the elections contested. Nor is such power claimed by the judges in the instant case, as we have seen from their answers, although formally invoked by the contestants. The only law cited by counsel for contestants that would seemingly authorize such contests before the courts and give power to the judges to determine them, is the proviso in Sec. 1386, R. S., quoted by the counsel in his brief, and which, in our opinion, has no reference to

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contests for the Legislature, but exclusively relates to contested elections for other State offices.

If, then, as it seems plain and even conceded by all parties, there is no power or jurisdiction in the courts to judge and decide these contests, but the duties of the judges in such cases as the one before us is to be directed and confined to the taking of depositions, or, as the judges themselves term it, a proceeding simply looking to the perpetuation of evidence, what will be the character of the functions they are to exercise in this instance? Evidently, *not* judicial. This has been expressly decided. *Redon vs. Spearing*, 31 Ann. 122; *United States vs. Ferreira*, 13 Howard, 40; *Elliott vs. Piersal*, 1st Peters, 341.

If the services or acts in question are not judicial, such as do not strictly belong to their office or duties as judges, then, in rendering the service required, they could be viewed in no other light than simply as commissioners. See same authorities. But under Act 92 of the present Constitution, judges are forbidden from exercising any functions but such as are strictly judicial.

In the face of this prohibition, their contemplated acts, even in the respected sense in which they are viewed by themselves, are in contravention of the Constitution, and are, therefore, void.

We hold, also, that the law invoked as justifying this proceeding is absolute, in view of the Constitution, as it now stands unfettered by any restrictive condition touching the power expressly conferred on the Legislature to judge of the election of its members.

Entertaining these views, we conclude that the acts and proceedings of the respondent judges complained of by the relator are unwarranted and illegal, and that the same should be annulled and set aside, and the prohibition be made peremptory.

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No. 10,142.

NELLIE FOLGER ET AL. VS. HENRY ROOS.

A decree for executory process is not a judgment in the strict sense of the term. It decides nothing, but may be appealed from.

It is an *ex parte* order which may be rendered at chambers as well during vacation as during term time.

Act No. 86 of 1866 was not designed to prohibit the granting of such orders. It proposed to continue in the courts the power of hearing and determining contradictorily, during vacation, motions to quash conservatory and other writs on the face of papers and not on the merits and suits to eject tenants.

Folger et al. vs. Roos.

Act 86 of 1866, which purported to enlarge the powers of the courts of New Orleans, as then composed, so as to authorize the hearing, during vacation, of motions to quash certain writs and orders, which are issued *ex parte*, has no reference to orders of seizure and sale, which are regulated exclusively by Art. 68 and Articles 732, et seq. of the Code of Practice.

A PPEAL from the Civil District Court for the Parish of Orleans.
Tissot, J.

W. W. Handlin for Plaintiff and Appellant.

Jas. McConnell for Defendant and Appellee.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is a petitory action by the widow and heirs of Antonio Palacio to be recognized as the owners of certain real estate and allowed the rents and revenues thereof from December 26, 1879, when, it is charged, the defendant took wrongful possession.

The main defense is, that the property was acquired by the defendant at a judicial sale, made on that day, which divested Antonio Palacio and passed his title to the defendant.

The plaintiff retorting, charges that the sale in question is a nullity, having been made in furtherance of an order for executory process, signed on September 4, 1879, by the judge of a district court, in New Orleans, *during vacation*, when, under the law, no such order could have been *then* validly granted.

The District Court heard the evidence adduced by the litigants in support of their conflicting claims and dismissed the suit. From this judgment the plaintiff appeals.

In order to establish that the decree for executory process could not have been signed during vacation and so is a nullity. The plaintiff relies on Act No. 86 of 1866 and on the rulings made in 21 Ann. 306 and in 23 Ann. 483.

The act declares that the district courts of New Orleans shall be open from the first Monday of November to the fourth of July, and shall remain open *all the year* for criminal and probate causes, for granting *interlocutory orders* and writs of arrest, habeas corpus, injunctions, sequestrations, attachments, mandamus and provisional seizures on motions to quash and not in their merits, and for proceedings to eject tenants.

The rulings in the two cases relied on are to the effect that the signing of a judgment is a judicial act and cannot validly take place without the consent of parties out of term time—i. e., during vacation.

Folger et al. vs. Roos.

The judgments thus signed were judgments rendered after a contradictory trial.

A decree for executory process is not a judgment in any sense of the word, within the meaning of the authorities cited, for it decides nothing, no more than an order for a conservatory writ of any description. It has been held to be a judgment only, so far that an appeal lies from it in a proper case.

It is known to both the Spanish and French systems. See Escriche, *Diccionario de legislación y jurisprudencia*, pp. 770, 819, 899, 979, and Merlin vol. *execution parée*.

In the case of *Mitchell vs. Logan*, 34 Ann. 998 (1003), we took pains to show that it lacks the elements of an ordinary judgment, saying substantially :

It is not preceded by a citation ; it is rendered on no issue ; it adjudicates to plaintiff no right not secured by his notarial act ; it creates no judicial mortgage by registry ; it authorizes no writ for the differences in case of deficiencies between the net proceeds of the sale of the mortgaged property and the amount of the debt.

Numerous authorities were quoted in support of those views, one which is to the effect that an executory proceeding is *not* properly a *suit*, but merely the aid of judicial power to give force and effect to what is equivalent to a judgment confessed. *Rousseau vs. Bourgeois*, 28 Ann. 186.

It is therefore strictly no judgment. It is simply an *ex parte* order *in rem*, granted at chambers, without any previous hearing, or notice to the ostensible owner of the property, directed to be seized and sold, to satisfy the debt acknowledged in the authentic form.

In the case of *Russ vs. Faust*, 15 Ann. 477, the court declared that the uniform practice is to issue executory process, or *decrees* rendered and signed at chambers.

The learned counsel for the plaintiffs concedes such to be the practice and the jurisprudence ; but he distinguishes, saying, that the practice is legal when the decrees are rendered and signed at chambers, provided this is done in term time, and that such decrees cannot be thus made, out of term, during vacation, because of the provisions of the act of 1866, No. 86, which does not specify that such decrees may be granted between the day of the adjournment and that of the reopening of a New Orleans district court, and which enumerates what judicial proceedings may take place contradictorily during vacation.

This is a fallacy resulting from a confusion of ideas touching the

purport of the act relied on and from a too narrow conception of its meaning and object.

The purpose in view was to enable litigants to try contradictorily with adverse parties, *during vacation*, motions to quash, on the face of the papers, and not on their merits and suits to eject tenants, which otherwise could not have been then entertained; but the act never was intended to abridge the rights of parties to any *ex parte* or interlocutory decrees to which they would have been entitled during *term* time.

Articles 63, C. P., has an immediate bearing on the subject.

It provides that where the hypothecated property is in the hand of the debtor, and when the creditors, besides his hypothecary right, has against his debtor, a title importing a confession of judgment, he shall be entitled to have the hypothecated property seized *immediately* and sold for the payment of the debt, etc.

The word *immediately* was not inserted in the law for a useless purpose. It means instantly, without delay, at any time, whether within or without term, and must receive its effect.

The Code of Practice calls the *fiat* in cases of executory process an "order of seizure." C. P. 735.

Far from shutting out the defendant from adequate relief, when the claim or mortgage cannot be enforced, the law leaves to the debtor a door wide open to urge, *after* the order has been rendered, defenses which he might have pressed in ordinary cases, only *before* judgment.

This identical question of the validity of an order for executory process made *during vacation*, was raised some sixteen years ago and was very summarily treated by the then Court.

See Thompson vs. Storrs, No. 2545, unreported, and found in O. B. 42, fol. 81, decided December 16, 1872.

In that case, the very authorities relied on (21 and 23 Ann.) were declared to be wholly inapplicable.

The order attacked having been seasonably made, the objection to its validity falls.

This conclusion is in perfect consonance with the spirit and letter of the law and the practice and is eminently conservative.

Construing the judgment of dismissal rendered below, as one rejecting plaintiffs' demand.

It is affirmed with costs.

ON APPLICATION FOR REHEARING.

POCHÉ, J. Plaintiffs' counsel makes an earnest effort to induce us to reconsider our opinion in this case.

Folger et al. vs. Roos.

The confusion in his mind evidently arises from a misapprehension of the true meaning of the statute under which he has rested his case.

According to his construction, the law is read to mean, that in the absence of that legislation, the district courts for the city of New Orleans were at that time powerless to issue, in vacation, any writs of arrest, habeas corpus, injunction, sequestration, attachment, mandamus and provisional seizure, and hence he argues that the omission of the law-maker to include orders of seizure and sale in the enumeration of the orders or writs which those courts were authorized to grant during vacation, must be construed as a legislative intent to prohibit the issuance of such orders, at any time between the fourth of July and the first Monday of November.

But such is not the purport of the law. It nowhere appears, either in the title or the body of the statute, that the Legislature thereby intended to amend or otherwise alter the articles of the Code of Practice which treat of the manner of issuing the various writs and orders hereinabove enumerated, and under which such writs have always been issued by all the courts in this State, including those of the city of New Orleans, in chambers and out of term time, from the very beginning of our judicial history.

The statute reads as follows: "The courts shall be opened from the first Monday of November to the fourth day of July, and for criminal and probate causes, for granting interlocutory orders and writs of arrest, habeas corpus, injunctions, sequestrations, attachments, mandamus and provisional seizures, *on a motion to quash, and not upon their merits*, they shall remain open the whole year." * * [Italics ours.]

Its title is "An act to amend an act entitled 'An act relative to district courts for the parish and city of New Orleans, approved March 29, 1865.'"

By reference to the latter act, it appears that the only amendment which was proposed by the amending act was to add to the orders enumerated the two writs of *attachment* and *mandamus*, and the power of trying proceedings instituted by a landlord for the possession of leased property, which features were not contained in the amended act, and also to shorten the session of the courts.

The manifest purpose of the legislation, as evidenced by both acts, was not to restrict, but, on the contrary, to enlarge, the powers of the courts referred to. Under the rules of the Code of Practice, as uniformly construed in jurisprudence, it is clear that all the conservatory writs enumerated in the act were issued *ex parte* at chambers

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and at any time of the year. Hence the act could not purport to grant a power already in legal existence and which had been exercised for more than half a century. But, without special legislative authority, the courts of New Orleans were without power to try and dispose, in vacation, of a motion to quash any of the writs enumerated, which they might have granted during such vacation.

The ends of justice required that the defendant, under any of said writs, which might have been wrongfully issued, shall be empowered to submit the question to judicial test, without the hardship of waiting until November following.

The sole object of the legislation under consideration was to remedy that evil, and under it the courts were authorized to hold sessions, in order to hear such writs *on a motion to quash, and not upon their merits*. Such is the true meaning of that statute, and it follows that it can have no possible reference to orders of seizure and sale, which are regulated exclusively by Arts. 63 and 732, *et seq.*, of the Code of Practice. They are, essentially, *ex parte* orders, which are admittedly issued at Chambers, and unquestionably in or out of term time. *Cumming vs. Archinard*, 1 Ann. 279.

We, therefore, conclude that we had committed no error in our previous opinion.

Rehearing refused.

No. 10,189.

STATE EX REL. J. A. SHAKESPEARE, MAYOR, ET AL. VS. JUDGE CIVIL DISTRICT COURT, DIVISION E.

An application for a prohibition, asked to issue to a court which is charged with usurpation of jurisdiction, or exceeding its powers, will not be entertained unless an exception has been made to its jurisdiction and has been overruled.

Mandamus does not lie to compel a suspensive appeal from an order *in limine*, granting an injunction, unless after exhaustion of adequate means to dissolve and the act enjoined, if committed, would cause irreparable injury.

APPPLICATION for Prohibition and Mandamus.

Carleton Hunt, City Attorney, for the Relator :

Cites the following authorities: Art. C. P. 846; *State ex rel. Logan vs. Third District Court of New Orleans*, 16 Ann. 186; *State ex rel. Michaud vs. Judge Fourth District Court*, 20 Ann. 239; Act 18 of 1886, *State ex rel. Walker vs. Judge*, 30 Ann. 136; *Livesey's case*, 34 Ann. 741; 39 Ann. 540; *R. R. Co. vs. Mayor and Council*, 39 Ann. 131; *Marrero vs. Barker*, 33 Ann. 302; Art. 566, C. P.; 14 Ann. 59; 16 Ann. 396; *Broussard vs. Judge*, 39 Ann. 225.

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State ex rel. Shakespeare, Mayor, et al. vs. Judge

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is an application for a prohibition and for a *mandamus*, coupled with a prayer for a *certiorari*, for the transmissior to this Court of the proceedings below.

The complaint is that the district judge has usurped jurisdiction in issuing against the relator and his executive subordinates an injunction to prevent him from executing Act No. 18 of 1886, known as the "Sunday law," at a public entertainment proposed to be had on Sunday, the 20th of May, instant, at the "*Fair Grounds*," in this city; that relator moved to set the injunction aside on the ground that the court had no jurisdiction *ratione materiæ* to entertain the application on which the writ was allowed; that said motion was denied hearing, and the injunction remains in full force and effect.

The relator further charges that he applied for a suspensive appeal from the order of injunction, and that the same was denied.

Hence, the relator prays that the district judge be prohibited from taking cognizance of the case, and in the alternative, that a *mandamus* issue to him to grant the appeal asked.

The district judge makes return to justify his action in the premises.

It appears that, before granting the injunction complained of, the district judge caused a rule to be taken, by the parties asking it, on the defendants in the case, the Mayor et als., to show cause why the injunction should not be granted; that the Mayor made a written answer, in which it is not charged that the court had no jurisdiction; that after hearing, the court, for reasons assigned, granted the order prayed for, and that under it the writ issued.

It also appears after this was done, the defendant took a rule to dissolve the injunction on the ground of want of jurisdiction *ratione materiæ*, asking that the matter be submitted and determined at once.

The district judge declined taking immediate action, and made the rule returnable on the 13th, three days after the application for relief, now under consideration, had been filed here.

When the present application was argued and submitted, the objection to the jurisdiction had not been acted upon. It is established by the jurisprudence of this Court that no application for a prohibition can be entertained until after a plea to the jurisdiction of the lower court has been urged and overruled.

The cases in which this has been held are so numerous that it would be cumbersome to enumerate them all. V. 29 Ann. 306; 37 Ann. 845; 38 Ann. 569, 920.

 Pasley vs. McConnell.

I.

The next question to be considered is: Whether a *mandamus* lies to compel a judge to grant a suspensive appeal from an order made by him *in limine* directing the writ to issue.

There is no doubt that such appeal lies, in an appealable case, from any interlocutory decree therein rendered, the execution of which may cause the party affected thereby an irreparable injury; but we were not informed of any case in which it has been held that an order *in limine*, granting an injunction, belongs to that class of decrees. On the contrary, it has been pointedly held that the suspensive appeal will not lie directly from such an order, at least, without clear showing that such decree must of itself work an irreparable injury. *State ex rel. Doullut vs. Judge*, 29 Ann. 869.

It must be admitted that an appeal on the merits of the case would afford no adequate remedy, as the controversy can be decided only after the 20th of May shall have passed; but it is apparent that the complainant has not exhausted his opportunities for prompt relief in the lower court.

He was entitled to move for the dissolution of the injunction, and he has actually made a motion to that effect which was pending and undetermined in the lower court when he applied for relief here.

Non constat that the district judge has not, or will not, on hearing, dissolve the injunction, and thus leave relator without any ground of complaint.

We cannot, under such circumstances, listen to the premature appeal to our supervisory jurisdiction.

It is, therefore, ordered and decreed that the application herein be dismissed, with costs.

 No. 10,068.

JOHN PASLEY vs. ANN MCCONNELL.—ANN MCCONNELL vs. JOHN PASLEY.

(Cumulated.)

Inaccuracies in a motion of appeal, in the bond and in the certificate of the clerk, amounting at most to clerical errors, are not sufficient to justify the dismissal of an appeal, if the proceedings are otherwise sufficient to identify the appeal with the judgment complained of, with legal certainty.

The rights of litigants cannot be jeopardized by slight inaccuracies of their counsel, or by the incompetency of clerks.

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117	978
40	609
119	964

Pasley vs. McCounell.

In furtherance of the ends of justice, a case will be remanded to enable a plaintiff to amend so as to set forth more explicitly his cause of action.

A judgment in a case in which a cause of action was not set forth, because it had then no existence, cannot constitute *res judicata*.

A PPEAL from the Civil District Court, Parish of Orleans.
Voorhies J.

W. S. Benedict, H. C. Cage and D. B. H. Chaffe for Plaintiff and Appellant.

J. Timony and J. Magoni for Defendant and Appellee.

ON MOTION TO DISMISS.

The opinion of the Court was delivered by

POCHÉ, J. The grounds of the motion will be better understood by a reference to the proceedings which preceded and led up to the judgment appealed from.

Pending a devolutive appeal to this Court from a large moneyed judgment rendered against the defendant in the suit entitled "Ann McConnell vs. John Pasley," execution was issued, and the plaintiff in suit became the adjudicatee of considerable property seized in said execution. On trial of the appeal, the final judgment of this Court reduced very materially the amount of the judgment appealed from, in fact to a sum less than one-half of the price of adjudication of the property of the seized debtor to the seizing creditor.

John Pasley then brought a suit for the nullity of the sale in execution of his property as hereinabove stated, but he was defeated. 38 Ann. 470.

He then had recourse to another action, with the object of enjoining Mrs. McConnell as purchaser, and her transferees, of the property in question, from interfering with said property, which he therein claimed as his own, and from taking possession thereof.

This is the suit hereinabove, entitled "John Pasley vs. Ann McConnell," No. 18,001, Division "B," to which it had been allotted as an original suit.

In that court, the cause was on an exception to the jurisdiction of the court, transferred to Division "C," where the original suit was pending, and of which the present action was held to have been an incident; a proceeding to regulate the execution of the judgment. In the latter court it was *cumulated* with the original suit, and it was dismissed on an exception of *res adjudicata*.

The present appeal was taken from that judgment.

Pasley vs. McConnell.

I.

In drawing their motion of appeal, counsel for appellant headed it with the title of the suit entitled and numbered, "John Pasley vs. Ann McConnell, No. 18,001," only; and that incident furnished the first ground of appellee's motion to dismiss.

It would unquestionably have been safer and more regular for counsel to have adopted the identical title which headed the judgment appealed from, and which heads the opinion; but that irregularity is not sufficient to vitiate the motion or the order of appeal, as both leave no doubt as to the precise judgment from which the appeal was intended.

Both titles appear defective and illogical. Either the new proceeding was a part or an incident of the main or original suit, or it was an independent original action. If the former, then the new title should have been dropped or merged in the original suit; if the latter, then the *cumulation*, as it is called, was erroneous. But neither error could in justice be attributed to appellant.

His motion conveys all the information necessary to identify his appeal with the judgment complained of.

II.

From appellant's petition it appears that there were several defendants in his proceeding, and hence in some parts of the record his action is entitled "John Pasley vs. Ann McConnell *et als.*," whereas, in his motion, he omitted the words *et als.* That is the subject of the second ground of the motion to dismiss, whence it is argued that all the defendants have not been cited.

But the motion was made in open court, and therefore no citation was needed; and all parties to the proceeding, who were not appellants, became appellees, if there was an appeal at all; and we have already shown that the motion was substantially sufficient to bring up the appeal. It cannot be destroyed by a clerical error.

III.

It is next contended that the appeal bond is radically defective, because it recites that the appeal is taken from the judgment in the suit of John Pasley vs. Ann McConnell, No. 2452, an entirely different suit from that described in the motion and in the order of appeal.

In this assertion appellees are mistaken; the recital is as follows: "Whereas, the above bounden John Pasley has this day filed a motion of appeal from a final judgment rendered against him, in the suit of John Pasley vs. Ann McConnell *et als.*, No. 2452, Civil District

Pasley vs. McConnell.

Court, cumulated with No. 18,001 of the Civil District Court for the parish of Orleans, on the 30th day of May, 1887, and signed on the 3d day of June, 1887."

Hence it appears that the only error of the recital consists in transposing the numbers of the two proceedings. But otherwise the bond is fully identified with the motion of appeal and with the judgment appealed from. The irregularity is not of such gravity as to defeat appellees in an action on the bond.

IV.

The fourth and last ground of the motion rests on a complaint levelled at the clerk's certificate, in which he erroneously makes "*John McConnell* defendant in the suit in which "*Ann McConnell*" is plaintiff; but the certificate recites that the transcript refers to a judgment rendered in matters numbered respectively Nos. 18,001 and 2452.

That is sufficient to show that there was merely a clerical error in one of the titles, especially as one of the suits is correctly described. The whole record is a bungle, in which one error is engrafted on another, but none sufficient to justify the dismissal of the appeal. Courts can and must deplore such careless and inartistic work emanating from officers whose labors should be characterized by neatness and precision, but they are forbidden by a sense of justice to deny the rights of an appellant, on account of the inaccuracies of his counsel, or of the unpardonable negligence or ignorance of a ministerial officer. *Eschert vs. Harrison*, 29 Ann. 860; *Granger vs. Reid*, 36 Ann. 845.

It is, therefore, ordered that the motion to dismiss this appeal be overruled at the costs of appellees.

Todd, J., absent.

ON THE MERITS.

BERMUDEZ, C. J. The only question to be decided in this controversy is, whether the adjudication made by the sheriff to Mrs. McConnell of certain property in the name of John Pasley, in 1883, shall or not be rescinded, on account of non-payment of the price, \$9500.

Mrs. McConnell contends that John Pasley's petition discloses no cause of action, and that his right to ask the nullity of the sale, was finally adjudicated upon adversely to him, and that the matter is forever finally set at rest.

From a judgment sustaining those defenses, Pasley has appealed.

Pasley vs. McConnell.

It is unnecessary to state the nature of the differences of the parties. They are of long standing and may be gathered from the opinions of this court to be found in 36 Ann. 703, 986; 37 Ann. 552, and in 39 Ann. p. —.

For the purposes of the present litigation it will suffice to make the following statement:

In 1882, while Mrs. McConnell held a judgment for \$14,660.59 against Pasley, and while the case was pending in this court on a devolutive appeal, Mrs. McConnell caused property of Pasley to be seized and offered for sale and became the adjudicatee thereof for \$9500.

Subsequently the judgment, to satisfy which the sale had been made, was reduced to \$2980 by this court.

Taking advantage of the word *reversed*, found in the decretal part of the judgment making this reduction and acting on the theory that by the *reversal* of the judgment for \$14,660.59, the adjudication made in execution of it was a nullity, Pasley brought suit to have that adjudication annulled, but failed in his attempt. This Court maintained the adjudication, but recognized Pasley's rights to recover eventually the excess of the price over the amount of Mrs. McConnell's reduced judgment.

The concluding portion of the opinion reads:

"As this action presents no feature of a claim for the price, or of the resolatory action for its non-payment, but seeks solely the nullity of the adjudication, we have no occasion to discuss such question now, or the rights of Mrs. McConnell's transferees. We simply determine that the present action cannot be maintained." 38 Ann. 476.

In the course of other controversy between the same parties, this Court subsequently said, alluding to the decision just mentioned:

"There was no express reservation to plaintiff (Pasley) of the right to sue for the rescission of the sale for non-payment of the price of adjudication of the property or for the surplus of the proceeds of sale; but there is, in our opinion, a clear intimation to the effect that suit of either character might be brought." 39 Ann. p. —.

Grounding himself upon what had thus been said, Pasley brought the present proceeding for the rescission of the sale for the non-payment of the price of adjudication.

He has joined as parties to the suit certain persons, the children of Mrs. McConnell, to whom he alleges that, for the purpose of preventing him from recovering the property, Mrs. McConnell has made a simulated title.

It is to this action that Mrs. McConnell and her co-defendants have set up the exceptions of *no cause of action* and of *res judicata*.

Pasley vs. McConnell.

I.

There is no doubt that the petition does not set forth expressly, so as to repel any misconstruction, what is really the cause upon which the relief sought is demanded; but, from the circumstance that the plaintiff has averred the judgment invoked as *res judicata* and has annexed a copy of it to his petition, it may be inferred that the cause of action is, that the plaintiff has called upon the defendant for the payment of the excess of the price of adjudication and that the defendant has refused to pay it.

Under the opinion and decree in the case alluded to, this was the only relief left the plaintiff.

II.

The suit resting on such a cause of action, it is clear that as this cause had not previously been averred, it could not be and was not passed upon by the judgment invoked to constitute *res judicata*.

Under the circumstances, we think that, in furtherance of the ends of justice, the case ought to be remanded to enable the plaintiff to state specifically that payment of the excess of the price of adjudication has been demanded and declined.

It is therefore ordered and decreed that the judgment appealed from be reversed; and it is now ordered and decreed that the exceptions be overruled, and that this case be remanded, with leave to plaintiff to amend his petition in accordance with the views herein expressed and to be further proceeded with according to law, appellees to pay costs, from the filing of the exceptions including those of appeal, future costs to abide the final determination of the suit.

CASES
ARGUED AND DETERMINED IN THE
SUPREME COURT OF LOUISIANA,
AT
MONROE,
IN
JUNE, 1888.

JUDGES OF THE COURT:

HON. EDWARD BERMUDEZ, *Chief Justice.*

HON. FÉLIX P. POCHÉ, HON. ROBERT B. TODD, HON. CHARLES E. FENNER, HON. LYNN B. WATKINS,	}	<i>Associate Justices.</i>
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No. 1199.

SUCCESSION OF L. M. OSBORN.

ON OPPOSITION TO ACCOUNT OF ADMINISTRATOR.

Advances clearly proved to have been used for to other than plantation purposes, cannot be allowed a privilege.

For services rendered by counsel in the settlement of a succession in which there was little or no litigation, the assets realizing some \$6000, an allowance of \$300 is ample, and will not be increased.

A vendor of real estate is entitled to a privilege for the payment of the unpaid price, which exists until it has been relinquished, or the debt satisfied, or prescription has run. The abandonment need not be in absolute terms. It is enough if it can be inferred from the acts of the parties that the vendor intended to waive his rank in favor of another and subordinate his claims, in order to secure payment of the latter by preference over himself. What surplus, if any, remains thereafter accrues to the vendor.

Mr. Justice Poché was absent during the term on account of illness.

Succession of Osborn.

A PPEAL from the Fifth District Court, Parish of Ouachita.
Richardson, J.

C. J. & J. S. Boatner for the Administrator, Appellant.

Stubbs & Russell for Opponent and Appellant.

The opinion of the Court was delivered by

BERMUDEZ, C. J. In the distribution of the funds of this succession the District Court disallowed certain advances which the administrator, in his individual capacity, claims to have made for the working of the plantation of the deceased. The court reduced the amount claimed by the counsel of the administrator for their services in settling the succession, and ordered a mortgage creditor to be first paid out of the proceeds of the property. It, besides, admitted the claim of an opponent, which is conceded to be due.

The parties aggrieved by this judgment now appear and complain that it is erroneous.

I.

The first complainant is the administrator, in his own name. He charges that the district judge has erred in rejecting his claims for \$244.35, which he had advanced Osborn for taxes, insurance and notarial fees.

The district judge considered that the amount disbursed was not advanced for purposes connected with the cultivation of the crop, and, therefore, was not secured by privilege.

It is not claimed that it is not so, but it is alleged that although the advances were not used for such purposes, they are secured by privilege, as the party advancing cannot be expected to control the disposition of the cash advanced by him for that object.

Pretermittin the question as to what extent the advancer of supplies and cash is bound to follow the actual application in order to preserve his privilege, it is sufficient to say that the judge *a quo* disallowed all such as were clearly proved to have been diverted to other than plantation purposes, and that we see no reason to interfere with his finding.

II.

The next matter to be considered is the fee of counsel. There was no evidence adduced in support of the amount placed on the account. Possibly none was necessary under the circumstances of the case.

On this subject the district judge says that it appears to have been

Succession of Osborn.

no litigation, except what has arisen on the opposition to their account, which has been provoked by ignoring the Brooks' claim and appropriating proceeds of the plantation to the Scottish American Mortgage Company.

The net amount realized and proposed to be distributed is \$5975.71. He accordingly reduced the allowance to \$300.

The services rendered in the litigation, touching the distribution, did not necessarily enure to the benefit of the estate, for of what concern was it to the succession that the mortgage company ranked or not Brooks, the vendor, or that McLain, individually, was or not entitled to a privilege for the amount of advances which he claimed to have made.

We find no error in the conclusion of the district judge.

III.

The subject now to be considered is whether Brooks, an opponent, is entitled to be paid the amount which he claims is due him as vendor, by preference over the mortgage company before alluded to.

It appears that Brooks had sold to Osborn the plantation in question for \$6000, one-third cash and the rest equally at one and two years; and that, when part of the debt or credit matured, Osborn undertook to borrow from the company a certain sum of money.

The company would not agree to make the loan, unless payment of it was secured by *first* rank on the property.

Hence, a notarial act was executed, in which it is declared that, in order to assist Osborn in raising the money, Brooks authorizes the recorder to cancel and erase his mortgage to the extent of \$2,500, and to enter on his records his waiver of rank in favor of the mortgage company, it being his intention to cancel the same so far as the payment is made, and to *waive the rank* of his mortgage for the balance only in favor of said company and the owners and holders of the notes.

The money raised by the loan was received by Brooks, and the notes which he held credited for as much.

The contention now is that, while he waived his mortgage, he did not abandon his privilege as vendor, which exists by operation of law so long as it has not been formally relinquished, and that, as he has done so as to his mortgage only, he ranks as such with the company.

No doubt the authorities are in that sense; but the issue is not one of *law*, but one of *fact*, on this subject.

It is manifest to our minds, as it was to that of the district judge,

State vs. Cloud, alias Clark.

that the intention of Brooks was to forego, and that he did give up, whatever encumbrance secured his debt on the property, in order to induce the company to loan the amount which it loaned and which he received.

It is no defense to say that he was not paid the \$2500, but that he received only \$2239.50. The record shows that he has acknowledged, in writing, to have received the \$2500. There is neither charge nor proof that the receipt was fraudulently procured, and it appears to be his voluntary act. Had he chosen, he might still have received less, and, even without any consideration, have yielded altogether the security in his favor for the payment of his claim.

However, as the waiver and subordination were made exclusively in favor of the mortgage company, Brooks would be entitled to receive what would remain of the proceeds after paying what privileged claims are to be satisfied out of them, superadding thereto that of the mortgage company.

We understand that the district judge has thus ruled.

IV.

The claim of Chambliss, an opponent, was allowed below and is recognized here. It must so remain.

It is, therefore, ordered and decreed that the judgment appealed from be affirmed with costs.

No. 1191

THE STATE OF LOUISIANA vs. JOHN CLOUD, ALIAS CLARK.

An appeal made returnable on the suggestion of the appellant at an improper place and at an improper time, will be dismissed.

A PPEAL from the Fourteenth District Court, Parish of Calcasieu.
Read, J.

J. C. Gibbs, District Attorney, for the State, Appellee.

A. R. Mitchell for Defendant and Appellant.

The opinion of the Court was delivered by

TODD, J. The defendant appeals from a sentence of nine months' imprisonment at hard labor, having been convicted of inflicting a wound less than mayhem upon one Narcisse Hulin.

State vs. Granger.

There is a motion on the part of the State to dismiss the appeal on the ground :

" That the appeal was not made returnable within the time nor to the place required by law."

The order granting the appeal was rendered on the 15th of May, 1888, and the appeal made returnable to Monroe on the first Monday in June, and at the suggestion of the defendant's counsel.

The law prescribes (quoting) : " All appeals shall be made returnable to the Supreme Court within ten days after granting the order of appeal, wherever the Court may be in session on return day." Sec. 4, Act 30 of 1878.

At the date of said order of appeal and more than ten days thereafter, this Court was in session in the city of New Orleans.

The order was, therefore, rendered in contravention of law. 32 Ann. 363 ; 36 Ann. 865 ; 38 Ann. 33.

It is, therefore, ordered that the appeal be dismissed.

No. 1192.

THE STATE OF LOUISIANA VS. MARTIN GRANGER.

An appeal made returnable on the suggestion of the appellant at an improper place and at an improper time, will be dismissed.

A PPEAL from the Fourteenth District Court, Parish of Calcasieu.
Read, J.

J. C. Gibbs, District Attorney, for the State, Appellee.

R. L. Belden for Defendant and Appellant.

The opinion of the Court was delivered by

TOPP, J. The defendant appeals from a sentence of twelve months' imprisonment at hard labor, imposed under the conviction of the larceny of a cow.

There is a motion to dismiss the appeal on the same ground urged in the case 1191, just decided. That case is identical with this, and for the reasons assigned for the dismissal of the appeal in that case, the motion to dismiss must also prevail in the instant case. The appeal is, therefore, dismissed.

Lehman, Abraham & Co. vs. Worley.

No. 1196.

LEHMAN, ABRAHAM & CO. VS. A. T. WORLEY, ADMINISTRATOR.

The law makes it the imperative duty of administrators of successions to see to and provide for the payment of succession debts, and, when necessary, to provoke the sale of the property, movable and immovable, for that purpose.

This duty cannot be paralyzed by the mere judicial denial by an heir that the debts are acknowledged by the administrator are truly due.

In order to restrain the execution of an order of sale provoked to pay debts, an heir must not merely allege, but prove, that the debts do not exist.

The law does not forbid the sale of succession property in the summer time, and the probate judge having, in the exercise of his discretion ordered the sale, we have no authority, on such ground, to interfere.

A PPEAL from the Sixth District Court, Parish of Morehouse.
Ellis, J.

R. B. Todd, Jr., for Plaintiffs and Appellants.

Bussey & Naff for Defendant and Appellee:

1. When a succession owes debts and there is no cash with which to pay them, it is proper for the administrator to present a list of allowed debts to the Court and obtain an order to sell property to pay debts. 15 Ann. 641; 28 Ann. 296, 633; 33 Ann. 344; 33 Ann. 466; C. C. 1668, 1670.
2. Money being scarce, or the market being dull, is no legal reason why a sale of succession property to pay debts should be enjoined by a residuary heir; the sale must be made when the necessity for it occurs, regardless of the condition of the market.
3. When a succession undergoing administration is appraised at \$6000, and owes debts to near, if not exceeding its value, and a residuary heir to one-fourth of this estate owes it \$4500 and has nothing with which to pay it, he (or the purchaser of his residuary interest) has, in fact, no pecuniary interest in the estate and is not justified in enjoining a sale of the estate property to pay debts, because the market is dull or money is scarce, or because he alleges that the estate owes no debts, and when on trial of such an injunction the evidence is conclusive that the debts exist, he is not justified in taking a suspensive appeal from the judgment dissolving the injunction, and should be mulct in ten per cent damages for a frivolous appeal. C. P. 907; 14 Ann. 287; 10 Ann. 641; 35 Ann. 83, 927.
4. The residuary heir who appeals from a judgment dissolving such an injunction occupies the same position as the appellant from a moneyed judgment, and must pay the estate damages for a frivolous appeal.

The opinion of the Court was delivered by

FENNER, J. The defendant, administrator of the succession of T. C. Worley, alleging that the succession owed debts of large amount, a full statement of which he embodied in his petition, and that the sale of the property, movable and immovable, was necessary in order to pay them, applied for and obtained an order of court for such sale.

Subsequently, and while the advertisement of said sale was pending, he filed a provisional account of his administration to date, and ap-

pended thereto a tableau of the debts due by the succession corresponding to the statement embodied in his petition for the sale.

The plaintiffs, who had become the owners of the share of one of the heirs in the succession, filed an opposition to this account, in which, amongst numerous other objections, they disputed the debts set down as due by the succession, and denied that the succession owed them. They then filed the present suit for an injunction restraining the administrator from proceeding with the sale which had been ordered until further orders of the Court. The preliminary injunction was granted, the case went to issue and trial, and final judgment was rendered dissolving the injunction, from which the present appeal is taken.

The grounds of the injunction are three :

1. That inasmuch as plaintiffs in their opposition had put at issue the existence of any debts due by the succession, the sale should not proceed until that issue had been determined.

2. That the succession owed no debts which required or justified the sale of its property and, therefore, the sale could not lawfully be made.

3. That the season of the year at which the sale was to take place was one when money was scarce and when the property could not find bidders for its value.

The first ground, by itself, has no merit.

As said by us in a former case, "it is the first and paramount duty of executors and administrators to watch over the interests of creditors and to see to, and provide for, the payment of their just claims against the successions which they represent, and to that end they are vested by law with full power to provoke the sale of the personal and, if need be, the immovable property of the succession." Succession of Tabor, 33 Ann. 344.

The law made it the imperative duty of this administrator to apply for the sale of the property in case he found such sale to be necessary for the payment of debts which he has ascertained to be due. C. C. 1164, 1165, 1668, 1670.

This is a duty which he owes to the creditors, and of which, in his default, they can compel the performance.

This duty cannot be paralyzed by the mere judicial denial by an heir that the debts, which have been ascertained and acknowledged by the administrator, are actually due. If an heir may restrain the execution of an order of sale obtained to pay debts acknowledged by the administrator, it must be, not because he has denied the existence of such debts, but because, in point of fact, they do not exist. In this injunction suit, he carried the burden of establishing that the debts

Succession of Worley.

did not exist, and that, therefore, the sale of the property for their payment was unnecessary and unauthorized by law.

The presumption in favor of the validity of the debts resulting from the administrator's acknowledgment cannot be overcome by the mere denial of the heir, which did not, therefore, vacate the order or furnish a cause for suspending the sale.

The second ground, if sustained by proof, would have been proper ground for the injunction; but it is not sustained. We need not discuss it further in this case, because the opposition itself, involving this issue, has been tried and is this day decided on appeal, rejecting the opposition and affirming the existence of the debts.

The third ground has no merit. The law is not a respecter of seasons any more than of persons, and her writs and orders operate as effectively in summer as in winter.

Judgment affirmed.

Todd, J., takes no part.

No. 1197.

SUCCESSION OF T. C. WORLEY—OPPOSITION OF LEHMAN, ABRAHAM & CO., TO PROVISIONAL ACCOUNT OF ADMINISTRATOR.

In case a deceased person leaves amongst his assets a plantation on which there is a *growing crop at the time of his death*, his heirs may prosecute the cultivation thereof and incur the necessary expense therefor, as an act of legitimate administration.

Once an administrator is appointed to said succession, he may continue the said planting operations, if conducted with the skill and care of a prudent owner, and the necessary costs of same is a proper charge against the estate and may be paid out of the proceeds of the crop.

If such venture proves successful and a profit is realized, neither an heir nor creditor can take the proceeds of the crop as an asset of the estate, and at the same time reject and disallow the cost and expense of production.

A PPEAL from the Sixth District Court, Parish of Morehouse.
Ellis, J.

Bussey and Naff for the Administrator, Appellee :

When the deceased had planted a crop and was furnishing the laborers, it is not only lawful, but the duty of the administrator to cultivate, gather and market the crop, to create all debts and pay same necessary to accomplishing that end, including purchasing and furnishing goods to the laborers, and it is also his duty to preserve and protect the property at the cost of the estate. 19 Ann. 494; 30 Ann. 133; 22 Ann. 316.

When the father is heir to one-fourth of a son's estate, and is tutor of the other heir, and the estate owes debts and he was helping his son to manage the farm, it is not only lawful, but his duty to preserve the property and see that the crop is worked pending the time that ensues between when he applies to administer and when he is appointed, and if this interval should be prolonged by an opposition, he is justified in going to such expense as may be necessary to protect the property, furnish the laborers and work the

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 Succession of Worley.

crops, until the opposition can be tried and overruled and the administrator appointed, and the estate must reimburse him in the amounts expended by him before he qualified as administrator, the same as if such expenditures had accrued after his confirmation. 15 Ann. 625; C. C. 2299, 2300.

The administrator can pay debts without an order of court, but in so doing he runs the risk of their being approved by the court as just debts. 33 Ann. 369; 4 Ann. 74; 7 R. 46.

R. B. Todd, Jr., for Opponents and Appellants:

An administrator is required to prove every item of his account under a general opposition; should make strict proof of every item. 29 Ann. 711; 4 Ann. 579; 12 Ann. 537; 18 Ann. 272.

An administrator has no power to create liabilities against estates they represent, change its obligations, or increase its responsibilities. 8 N. S. 451; 2 La. 185; 1 R. 119; 17 Ann. 17; 21 Ann. 236; 23 Ann. 428; 24 Ann. 83; 39 Ann. 696; Succession of Sparrow.

If it should be necessary to conduct a plantation for the benefit of a succession during the time necessary for settling it up, *special authority* must be obtained from the Court to do so, in order to bind the estate for current expenses. 23 Ann. 428.

An administrator is limited in expenses to the amount necessary to preserve the property left in his care.

In order to complete a contract of lease three things must concur, to-wit: The price, the thing and the consent. The price must be certain and determinate, or else there is no lease. Arts. C. C. 2670, 2671 and 2672.

The opinion of the Court was delivered by

WATKINS, J. The succession of T. C. Worley was opened by his death on the 27th of April, 1886, and his property, real and personal, was appraised at about \$7000. He died intestate, and his father and one sister were his only heirs, and by operation of law the latter inherited three-fourths and the former one-fourth thereof.

In May following, opponents caused an execution to issue under a judgment they had previously obtained against A. T. Worley, the father, and thereunder to be seized, the undivided one-fourth interest he had inherited in the succession of J. C. Worley, the son, and, at execution sale made in the month of November following, they became the adjudicatees thereof.

During the pendency of these proceedings, A. T. Worley applied for and obtained the appointment of administrator of his son's succession, and he was qualified as such on the 6th of July, 1886. On the 11th of July following he filed a provisional account, which was opposed by the purchasers, and their opposition having been rejected *in toto*, they have appealed.

I.

At the time of his death, T. C. Worley owned and operated a cotton plantation. It had been planted, but the crop was so immature that it was valued in the inventory as worth nothing. There was opposition made to the appointment of A. T. Worley as administrator, and

Succession of Worley.

during the pendency of the opposition the applicant continued to manage the plantation and superintend the cultivation of the crops thereon, and furnished the laborers who were working on the share system.

After his qualification he continued to buy goods and supplies for these purposes upon terms of credit and had the same charged to his account as tutor, notwithstanding they were used on the plantation. He gathered the crops, and marketed them. He closed the accounts of laborers by accepting cotton in settlement. He assumed the responsibility of applying the proceeds of the crop to the satisfaction of certain privileged and ordinary debts. On his provisional account he charges himself with the amount of the inventory, the net proceeds of the cotton crop, \$5,661.46, and the proceeds of the sale of corn—the whole aggregating the sum of \$13,524.82.

He credits himself with the value of the real and personal property on hand, unsold. He shows that he disbursed the proceeds of the crop in payment of bills for supplies, bagging and ties, shop and freight bills, and, in fine, bills of every nature applicable to the cultivation of a cotton crop. He shows that, in addition, he paid individual debts of the deceased to the amount of \$3,931.77.

On this showing it appears that the amount of the debts remaining unpaid is only \$4,045 52, and that, by virtue of the administrator's planting operations, the condition of the estate has been improved to the extent of \$2,960.31 within less than one year after he had qualified.

The position assumed by the opponent's counsel is that the *status* of a succession is fixed at the date it is opened, and its liabilities cannot be augmented afterwards by any act of the representatives of the deceased.

He then formulates this proposition, viz :

"At the death of T. C. Worley his property was inventoried at \$7,085.50. The crop of five hundred acres, not inventoried, was well worth \$5,000.00. Then, according to the inventory on file, and a fair estimate of the crop, Worley's succession at the time of his death was worth \$12,085.50."

With this assumption as the basis of his client's case, he undertakes to show that all the debts that were contracted by A. T. Worley, as tutor and administrator, for the account of the succession in the course of his planting operations in 1886, should be entirely eliminated from the account. The only items of indebtedness which he intimates a willingness to allow, are the supply account of John Phelps & Co., of \$2,500, and the amount the administrator paid on

Succession of Worley.

the mortgage of Moses Wolf of \$793.90. This allowance would result in a balance of \$2,568.42, for which the administrator should account.

The opponents specially resist the allowance of the claims of Handy, Davenport, Andrews and Miss Alma Worley. The only objection urged in oral and printed argument against the first three is, that they were contracted by A. T. Worley, either in his capacity of tutor or administrator, after the succession of T. C. Worley was opened, and that he did not have the power or rightful authority to bind his succession therefor. But the one that is urged against the claim of Miss Alma Worley is that the deceased was not indebted to her for rent of the years 1885 and 1886, because there was no contract of lease during those years; and because the deceased had expended for her account, in 1884, more than the amount of the rent. There was nothing due for that year.

II.

In this controversy, it may be conceded *arguendo*, that Lehman, Abraham & Co., as the purchasers of the undivided share of A. T. Worley in the succession of the deceased, occupy identically the same position that he did as an heir. They purchased *cum onere* and subject to the payment of his proportion of the debts of the deceased. When T. C. Worley died, A. T. Worley, his father, was the only living male heir. He was the only person capable of taking charge of the plantation and of administering its affairs. The deceased had planted a crop, and his death occurred in the month of April, that particular season when it most needed attention and care. His application to administer was opposed by them, and his qualification was delayed, on that account, until July. It seems to us needless to cite authority to demonstrate his right to act in the premises as he did. In our opinion he would have proven himself a recreant father and heir, and an unfaithful administrator, if he had not.

It appears to us to be unreasonable and unjust to treat the proceeds of the crop as an asset of the succession, and, at the same time, to refuse to allow credit to the administrator for the amounts he expended, necessarily, in its cultivation and preparation for market. It seems to us equally unreasonable to treat it as an individual adventure of A. T. Worley, when it manifestly yielded a large profit for the estate.

Evidently there is involved in these transactions no question of maladministration. It is manifestly improper for us to grant opponents' request, when we take into consideration the fact that they purchased the interest of A. T. Worley in November, 1886, when the crop was

Succession of Worley.

fully matured, and without protest; and considering the further fact, that they were fully advised by the account, of the large profit the venture had yielded, when, in July 1887, they filed their opposition and made pretension to it.

We have no hesitancy in approving the acts of A. T. Worley, tutor and administrator, as legitimate and proper acts of administration. This case is easily distinguishable from that of the Succession of Sparrow, 39 Annual. For in that case, in discussing the identical question under consideration here, we employed this language, viz:

"The rule is not absolutely inflexible to the extent of annulling or defeating a debt incurred by an administrator in meeting the expenses necessary to *save and harvest* a crop already begun, or hanging by the roots at the date of his appointment.

Miltenberger vs. Elam, 11 Ann. 668; Succession of Decuir, 22 Ann. 372; Miltenberger vs. Taylor, 23 Ann. 189; Carroll vs. Davidson, 23 Ann. 428; Forsheim vs. Holt, 32 Ann. 133." Ibid, p. 702.

This succession occupied just that situation at the date of T. C. Worley's death and that of A. T. Worley's appointment, and that doctrine is strictly applicable to the debts and obligations which A. T. Worley contracted for its account, and disbursed from the proceeds of the crop that was grown and gathered during the ensuing season. They were undoubtedly proper charges against the crop, if not debts of the succession, strictly speaking.

III.

It appears from the evidence that Miss Alma Worley owned a small plantation of 250 acres, which T. C. Worley cultivated during the years 1884, 1885 and 1886. In 1884 he contracted to pay for her land five dollars per acre; that is \$1,250 00 for the whole. During that year he purchased of her \$800 worth of corn. This contract of lease was renewed in 1885, and again in 1886, by a verbal agreement, or tacit reconduction.

The following settlement was made of the mutual accounts of the parties, viz:

She charged him with note for corn and rent in 1884.....	\$2,000 00
Rent of 1885 and 1886.....	2,400 00
Total.....	\$4,400 00
Credit by schooling, clothing and general maintenance, two and one-third years.....	\$1,400 00
By possible amount of taxes.....	300 00
By 1,000 barrels of corn received of administrator	500 00—2,200 00
Balance due.....	\$2,200 00

Colvin vs. Woodward.

This statement was accepted by the judge of the vicinage, who knew the witnesses and heard them testify; and our examination of the record justifies the conclusion he reached.

We have no doubt of the fact that opponents' counsel acted in their interest, with the lights he had upon the question involved, and as he would not have done had he been possessed of the facts that were elicited upon the trial.

The administration of the estate has been delayed, and possibly embarrassed by this litigation, but that is a misfortune common to all litigants. This is not a case which would justify us in assessing damages against the opponents for the prosecution of a frivolous appeal.

Judgment affirmed.

Mr. Justice Todd takes no part in this opinion.

No. 1,193.

J. M. COLVIN vs. W. E. WOODWARD.

40	627
48	1074
40	627
50	390

Where a devolutive appeal is taken from an alternative judgment which directs the defendant to do a certain thing within a fixed delay, and in default thereof, inflicts a more onerous penalty, execution of the first alternative under protest, and with reservation of rights of appeal, is not such voluntary acquiescence as destroys the appeal.

The Homestead right cannot be contractually waived, renounced or destroyed, otherwise than by sale or its equivalent, and, finding that in this case the defendant has not sold or alienated his homestead, his claim for its protection must be sustained.

A PPEAL from the Third District Court, Parish of Lincoln.
Young, J.

Patterson & Dormon and Sam'l Barksdale for Plaintiff and Appellee :

Where act of sale and counter letter both concur in asserting that it is a sale, the latter containing the agreement that the vendor may redeem within a given time, it must be held to be a sale with the right of redemption, and if the right is not exercised within the time agreed on, the vendor can not exercise it afterwards, and the purchaser becomes irrevocably possessed of the thing sold. C. C. 2570. 38 Ann. 271.

Act of sale and counter letter, though not designed by the parties to be absolutely final, the title to be put back in vendor's name as soon as the conditions of their execution are complied with, does not establish a simulation but a real transaction by which title passes. 38 Ann. 482; 39 Ann. 488.

Where any one of the conditions required by Article 222 Constitution ceases to exist, the right to the homestead must fall. *Dennis vs. Gayle, et al*, 39 Ann. reported in Southern Reporter, page 6.

Graham & Holdstead, for Defendant and Appellant :

Supreme Court has appellate jurisdiction in all cases where homestead rights are involved
Amendment of Article 81 of Constitution.

An appeal is a Constitutional right, and the "act should be unequivocal to authorize a presumption of the abandonment of so important a right. 1. La. 296, 24 Ann. 485, 29 Ann. 762, 862.

Colvin vs. Woodward.

No mortgage nor promise to sell land legally set apart as a homestead can be enforced, and no court has jurisdiction to compel compliance. Constitution—Articles 219, 220, 221 and 222.

Where an agreement for the sale of immovable property has for a basis a giving in payment, such agreement can have no effect unaccompanied by actual delivery. C. C. 2656.

Where lesion exists in an agreement for the sale of real estate it cannot be enforced. C. C. 1869, 1861.

Parol is not admissible to prove a promise to sell immovable property. C. C. 2275, 2276.

The opinion of the Court was delivered by

FENNER, J. This action is brought to enforce specific performance of the following written contract signed by defendant:

"I hereby agree to carry J. M. Colvin one bale of cotton, and make a deed to him of forty acres of my land, and he make a deed to me for the land I deeded him, and which is now on record in his name, this October 5, 1886."

The defense is that the land referred to in the instrument, is part of his duly recorded Homestead, and that, under the Constitution of the State, the court is without jurisdiction or authority to compel him to execute the agreement so far as said land is concerned.

The court *à qua* gave judgment in favor of plaintiff, ordering defendant, within thirty days from its date, to execute a deed conveying to plaintiff forty acres out of the one hundred and sixty acre tract claimed as his Homestead, and in default thereof, that plaintiff "have the right of selecting from the above described land, such forty acres as he may desire, and, upon filing such selection in the office of the clerk of court, and having same duly recorded in the book of Conveyances, he be decreed the absolute owner, and be put in possession of same."

Defendant forthwith applied for and obtained a devolutive appeal to the Circuit Court, which dismissed it (so far as the land is concerned) on the ground that it involved the Homestead right, which is within the exclusive appellate jurisdiction of this Court. Defendant then took out his present devolutive appeal to our Court. Before the lapse of the thirty days allowed in the judgment of the District Court, defendant executed a deed to plaintiff of forty acres of land, selected by himself, reciting, however, in the deed, that he had taken and intended to prosecute a devolutive appeal from the judgment, and reserved all his rights of appeal, and that he so acted because he was unable to take a suspensive appeal, and because, on his failure to do so, plaintiff would execute his judgment by selecting the most valuable forty acres, containing the dwelling, etc., of himself and family, and oust them from the possession thereof.

Colvin vs. Woodward.

MOTION TO DISMISS.

This motion is based on two grounds:

1st. That the case involves no right to Homestead, because the contract sued on is a *sale* of part of the Homestead, which is expressly permitted by the Constitution.

2d. That the defendant has acquiesced in the judgment by the voluntary execution thereof.

So far as the first ground is concerned, it clearly goes to the merits of the case, and involves the very question to be decided by us as to the validity of the Homestead right set up by defendant.

The second ground we consider untenable.

The Code of Practice denies the right of appeal to a party when he has acquiesced in the judgment by executing it voluntarily. Article 567.

Here was an alternative judgment, under the terms of which defendant was bound, within thirty days, to convey to plaintiff forty acres of his homestead tract selected by himself, or, on his failure so to do, giving plaintiff the absolute right to select the land on which the dwelling-house of his family was situated, and to turn them out and take possession.

Being unable to appeal suspensively, what was defendant to do?

The alternative presented to him was very similar to that discussed in a former case, where the Court said: "The defendant has to satisfy the judgment, or go to jail. There is not here the acquiescence which the law contemplates. It must be the voluntary act of the debtor." *State ex rel. Hoey vs. Brown*, 29 Ann. 862.

Here the defendant had to select and convey the land or have himself and family turned out of house and home.

In another case, where payment was made under threat to seize and sell a merchant's stock in trade, this was held not to be such voluntary execution as debarred appeal. *Johnson vs. Clark*, 29 Ann., 762.

In a case yet more similar to the instant one, the judgment condemned defendant to deliver 6000 pounds of cotton, or in default thereof to pay \$3120. Execution having issued, defendant delivered the cotton, which cost him only \$1920, in order to avoid a seizure for the larger alternative sum named in the judgment, and this was held to be not a voluntary settlement, but one made "under compulsion of the law," and not debarring a devolutive appeal. *Yale vs. Howard*, 24 Ann. 458.

It is true that in the above case execution had been issued; but here execution was not necessary to expose the defendant to the danger

Colvin vs. Woodward.

and damage which he sought to avert; because, under the terms of the judgment, by the mere lapse of thirty days, his right to select the forty acres to be delivered expired and plaintiff acquired the absolute right to make his own selection, which defendant would, thereafter, have been powerless to prevent.

For these reasons the motion to dismiss the appeal is denied.

ON THE MERITS.

Plaintiff denies that defendant is entitled to any protection under the homestead law, on two grounds, which we will consider successively.

1. He claims that defendant's recorded Homestead claim had been lost by virtue of a prior sale which he had made to him of this entire property. It appears that in 1886, defendant being indebted to plaintiff in the sum of \$79 39, executed a deed to the latter of his whole Homestead tract of 160 acres. It is stated among the allegations of plaintiff's own petition that this conveyance was executed "in order to secure unto him the full and punctual payment of said sum," and that he gave to defendant "a counter letter stating that said deed was made for the purpose of securing to petitioner the payment of the said sum of \$79 39, and agreeing that if said sum was paid by 1st of November, 1886, he would reconvey said land to defendant."

Neither the deed nor the counter letter appear in the record, but the foregoing statement of their contents conclusively stamps the transaction, which was unaccompanied by any delivery, as merely hypothecary or pignorative in its character, and neither intended nor operating as a divestiture of plaintiff's title. The amount due was subsequently paid by defendant and the transaction was cancelled by a return to each other of the deed and the counter letter, though plaintiff never executed a formal reconveyance of the land, which he is ordered to do by the present judgment. We are satisfied this transaction never transferred the ownership or destroyed defendant's homestead right.

2. It is claimed that the contract now sought to be enforced is itself enforceable as a sale or promise to sell a part of the homestead, which is valid under Article 222 of the Constitution, which, after prohibiting mortgages or waiver of homestead rights, declares that "the right to sell any property which shall be recorded as a homestead shall be preserved."

The defendant undoubtedly has the right to sell—but has he sold?

It is too self-evident to require comment that the instrument copied in the beginning of this opinion is not a sale. It is simply an executory promise to convey.

 Chaffe & Sons vs. Whitfield.

Article 220 of the Constitution declares: "No court or ministerial officer of this State shall have jurisdiction or authority to enforce any judgment, execution or decree, against the property set apart as a homestead."

This decree is obviously one to be enforced against the homestead property, in satisfaction of a right claimed which is not within any of the exceptions to the prohibition. No court has authority to render or enforce any such decree.

This defendant has his homestead rights in this property, which he cannot validly waive or renounce, or contractually destroy, otherwise than by sale or its equivalent, and he has not sold or alienated the property. He asserts those rights and we are bound to protect them. It is not necessary, nor do we mean, to determine whether any alienation of the homestead other than by sale would be valid. Here there was no alienation.

It is, therefore, ordered, adjudged and decreed, that the judgment appealed from, in so far as it orders defendant to convey to plaintiff any portion of his homestead tract, or recognizes the right of plaintiff to claim or take any portion thereof, be and the same is annulled, avoided and reversed, and the demand of plaintiff to that effect is rejected, without prejudice to any other portions of said judgment which are not within our jurisdiction, plaintiff and appellee to pay costs of this appeal.

 No. 1195.

JOHN CHAFFE & SONS vs. MRS. MARY F. WHITFIELD.

A note secured by mortgage, issued by a planter to the order of his merchant, to make good all advances for the working of a plantation, although received as "COLLATERAL SECURITY," may be sued on, directly by the latter, for the exact amount of the advances,—as a pledgee could do.

In the absence of proof of want of consideration, and in the presence of evidence showing that the advances have been made, payment of the note may be enforced by the seizure and sale of the mortgaged property.

A PPEAL from the Twenty-seventh District Court, Parish of Richland. *Williams, J.*

Montgomery & Rhymes, and A. L. Slack, for Plaintiffs and Appellees.
Po'ts & Hudson for Defendant and Appellant.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is an action *via ordinaria* to enforce the payment of a note of \$3,000, secured by mortgage.

40	631
46	1498
40	631
120	1087

Chaffé & Sons vs. Whitfield.

The defence is, "that the note was given as collateral security for an account of supplies and cannot be enforced, being without consideration except for the amount due upon the principal debt, that for supplies; and that, as nothing was due on that account, the note cannot be enforced."

From a judgment in favor of the plaintiffs, the defendant appeals.

It appears that the defendant, who is a widow, applied in 1880 to the plaintiffs for an advance of supplies for her plantation.

To this the plaintiffs assented, on condition that she would execute a note for \$3,000, secured on her plantation, saying that they would hold it as *collateral security* for her indebtedness.

The note was drawn and the mortgage given. On receiving the note, the plaintiffs passed the amount to the defendant's credit, charging her with all advances of whatever nature made by them to her, and sending her regular accounts of their relations, as merchants and planters, until the amount was absorbed.

It appears by an indorsement on the note, signed by the plaintiffs and by the defendant, that all interest was paid on the note up to January 17, 1884.

We have carefully weighed the testimony adduced by the plaintiffs and that given by the defendant, and remain satisfied that the advances alleged to have been made during a course of years, have been received, and that the defense of want of consideration set up is utterly groundless.

In her testimony, the defendant admits advances, although she does not specify the amount, and shows that out of the moneys received by her, she bought mules for more than \$1,000.

The defendant can derive no comfort or relief from the circumstance that the plaintiffs had agreed to hold the note as "*collateral security*."

The intention of the parties was clearly that the plaintiffs would furnish the supplies on a mortgage security given them by the defendant, and that in case of non-payment for those advances, the plaintiffs would have the right to enforce the note and mortgage. This is apparent, from the circumstance that the note is made payable to the order of the plaintiffs and that the mortgage given to secure the note is executed in their favor.

The right of the plaintiffs to sue directly on the note for the amount of the advances really made is undeniable (R. C. C. 3292); and may

School Directors vs. Edrington.

well be assimilated to the right of the pledgee of a note, suing on the note pledged, to recover the amount due and which the pledge was designed to secure. R. C. C. 3170.

The judgment of the lower court has done justice between the parties and should not be disturbed.

Judgment affirmed.

No. 1202.

PARISH BOARD OF SCHOOL DIRECTORS vs. WM. H. EDRINGTON.

One who purchases at an execution sale the right, title and interest of the defendant in execution, acquires *only* such title as the latter had.

If amongst the property sold there is a lot, which the expropriated owner was possessed as a *lessee*, the adjudicator would take as such, and be substituted as lessee in his place *pro tanto*.

Prescription *acquirendi causa* cannot be acquired under a title resulting from a lease.

Prior to the passage of the Act of the 3d of April, 1853, notarial titles were not required to be filed and registered in the book of conveyances in the recorder's office.

The right of a proprietor of real property evidenced by the registry of a conveyance thereof in the proper book, and the proper office, in the parish in which it is situated at the time, is not affected by the incorporation of it into a new parish, and no additional registry in the new parish is necessary in order to preserve its effect.

A PPEAL from the Eighth District Court, Parish of Madison.
Delony, J.

A. L. Slack for Plaintiff and Appellee :

1. The following articles of the R. C. C. are in point : 3441, 3442, 3445, 3446, 3487, 3488, 3489, 3490, 3556 No. 25.
2. Prescription only attaches to a right when it can be exercised. 2 H. D. 1227, No. 2, Plaintiff's right to reclaim the land never arose until after the lease expired in 1886. consequently this right could only, and never before, be judicially enforced when the right arose or the demand was due. C. P. 1.
3. No one can be barred by prescription from the exercise of any right to be computed from a time at which the right did not exist. 38 Ann. 529, *Chen vs. Violet*; 36 Ann. 412; 32 Ann. 1041.
4. The heirs of a deceased person are seized of his succession at the very instant of his death, and the right of possession that the deceased had continues in them, with all its defects and advantages; the change in the proprietor producing no change in the nature of his possession. *Castle vs. Lloyd*, 38 Ann. 587.
5. Mrs. Edrington acquired by sheriff's sale no greater rights than her husband had to Sec. 6. This rule that a purchaser acquires no more than his vendor's rights, is applicable to all class of sales. 4 L. 120; 10 R. 357; 2 Ann. 143; 4 Ann. 52; 4 Ann. 104; 5 Ann. 67. And a vendor of property sold under a *fi. fa.* acquires no right which did not belong to the debtor. 8 N. S. 336; R. C. C. 2620; C. P. 690, 691. The purchaser at sheriff's sale buys the title, such as it is. 9 R. 206, *Fuller vs. Harman*. All Mrs. E. could acquire was her husband's interest in this lease, for that was all he owned. See *Marcade on Prescription*, pp. 95-106.
6. The plaintiff was no party to Mrs. E.'s suit against her husband. R. 127. She only

40 633
45 490

Chaffé & Sons vs. Whitfield.

The defence is, "that the note was given as collateral security for an account of supplies and cannot be enforced, being without consideration except for the amount due upon the principal debt, that for supplies; and that, as nothing was due on that account, the note cannot be enforced."

From a judgment in favor of the plaintiffs, the defendant appeals.

It appears that the defendant, who is a widow, applied in 1880 to the plaintiffs for an advance of supplies for her plantation.

To this the plaintiffs assented, on condition that she would execute a note for \$3,000, secured on her plantation, saying that they would hold it as *collateral security* for her indebtedness.

The note was drawn and the mortgage given. On receiving the note, the plaintiffs passed the amount to the defendant's credit, charging her with all advances of whatever nature made by them to her, and sending her regular accounts of their relations, as merchants and planters, until the amount was absorbed.

It appears by an indorsement on the note, signed by the plaintiffs and by the defendant, that all interest was paid on the note up to January 17, 1884.

We have carefully weighed the testimony adduced by the plaintiffs and that given by the defendant, and remain satisfied that the advances alleged to have been made during a course of years, have been received, and that the defense of want of consideration set up is utterly groundless.

In her testimony, the defendant admits advances, although she does not specify the amount, and shows that out of the moneys received by her, she bought mules for more than \$1,000.

The defendant can derive no comfort or relief from the circumstance that the plaintiffs had agreed to hold the note as "*collateral security*."

The intention of the parties was clearly that the plaintiffs would furnish the supplies on a mortgage security given them by the defendant, and that in case of non-payment for those advances, the plaintiffs would have the right to enforce the note and mortgage. This is apparent, from the circumstance that the note is made payable to the order of the plaintiffs and that the mortgage given to secure the note is executed in their favor.

The right of the plaintiffs to sue directly on the note for the amount of the advances really made is undeniable (R. C. C. 3292); and may

School Directors vs. Edrington.

well be assimilated to the right of the pledgee of a note, suing on the note pledged, to recover the amount due and which the pledge was designed to secure. R. C. C. 3170.

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Judgment affirmed.

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4. The heirs of a deceased person are seized of his succession at the very instant of his death, and the right of possession that the deceased had continue in them, with all its defects and advantages; the change in the proprietor producing no change in the nature of his possession. Castle vs. Lloyd, 38 Ann. 587.
5. Mrs. Edrington acquired by sheriff's sale no greater rights than her husband had to Sec. 6. This rule that a purchaser acquires no more than his vendor's rights, is applicable to all class of sales. 4 L. 120; 10 R. 357; 2 Ann. 143; 4 Ann. 52; 4 Ann. 104; 5 Ann. 67. And a vendee of property sold under a *fi. fa.* acquires no right which did not belong to the debtor. 8 N. S. 335; R. C. C. 2620; C. P. 690, 691. The purchaser at sheriff's sale buys the title, such as it is. 9 R. 206, Fuller vs. Harman. All Mrs. E. could acquire was her husband's interest in this lease, for that was all he owned. See Marcade on Prescription, pp. 95-106.
6. The plaintiff was no party to Mrs. E.'s suit against her husband. R. 127. She only

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acquired such right as her husband had, and as that was only a right to an unexpired lease, plaintiff could not interfere until a cause of action arose at the termination of the lease.

7. A party cannot change the origin and nature of his possession. 2 H. D. 1194, and cases.
8. A lessee's possession is the lessor's, whose title the former cannot dispute. The tenant, having entered as such, cannot change the character of his possession by possessing for himself under a subsequent title. 1 H. D. 800, No. 6; 2 H. D. 1194, No. 7; 2 H. D. 1204 No. 25. See also, 14 Ann. 814, Calmes vs. Duplantier; 14 Ann. 239, Jackson vs. Jones; 30 Ann. 591.

The case of Jackson vs. Jones was a school board case, similar in many respects to the present case, and one in which a prescriptive title to a school section under a lease was pleaded and overruled.

9. A party cannot controvert the title of one under whom he claims. 1 N. S. 577; 4 N. S. 402; 4 Ann. 249.
10. Neither party can attack the title of their common author. 2 L. 213; 8 L. 269; 1 R. 369; 5 Ann. 677.
11. Tenants, whilst retaining possession, cannot deny the title of their landlord, nor set up a title against him acquired during the tenancy. 95 U. S. 444; 3 Peters, 43; 6 Peters' 369; 92 U. S. 107; Rector vs. Gibbons, 111 U. S. 276. See also, Gerault vs. Zunts, 15 Ann. 684; Johnson vs. Dunbar, 26 Ann. 189; Jackson vs. Jones, 14 Ann. 230.
12. The sale of the property of another is a nullity. R. C. C. 2452; 3 Ann. 326; 1 Ann. 284; 4 Ann. 458; 16 Ann. 251; 27 Ann. 489.
13. The maxim, "*contra non valentem*," etc., applies. It is sanctioned by our jurisprudence. 36 Ann. 409; 32 Ann. 1041.
14. One must hold the thing in fact and in right as owner. R. C. C. 3487. A title defective in form cannot be the basis of prescription. 38 Ann. 885.

Stone & Murphy for Defendant and Appellant:

In a petitory action, plaintiff must rely upon the strength of his own title. The unauthorized and unsigned entry upon a tract book of the words "selected for schools" opposite the number of a section, is no evidence of title. The objection that this was not the best evidence of the fact sought to be established, and was irrelevant, should have been sustained and this evidence excluded. Being admitted, it proves nothing, except the fact itself, that these two words are there written. Brea vs. Louriére et al., 37 Ann. 736; 9 Ann. 281; 12 Ann. 177.

The School Board is not sovereign on its rights of property: prescription runs against every one except the State and United States. 12 Ann. 151. Therefore, if title ever was in the School Board, defendant can plead prescription in bar of plaintiffs' action.

When the sheriff conveys all the right, title and interest of defendant in execution, he conveys the property itself. 13 Ann. 335.

The rule, *contra non valentem agere non currit prescriptio*, cannot be invoked in favor of plaintiff where defendant pleads prescription *acquirendi causa*. Reynolds vs. Batson, 11 Ann. 729.

A purchaser from a lessee may prescribe for the ownership. C. C. 3513; 14 Ann. 230.

A purchaser in good faith prescribes in ten years, no matter how defective the title of his vendee. C. C. 3451; 3484; 36 Ann. 211. A possessor cannot be deprived of the right of pleading prescription; because by inquiry and careful examination he might discover that his vendor had no title. 38 Ann. 885.

A purchaser at a judicial sale, without notice of defects, is in good faith and can prescribe. 38 Ann. 770.

The opinion of the Court was delivered by

WATKINS, J. In this, a petitory action, the Parish Board of School Directors sue for the recovery of about one hundred and sixty acres of valuable land, known as section six, of township eighteen north, of range fourteen east.

The averment is that it belongs to petitioner, "said tract having been designated under the Act of Congress of the United States as school lands, and is so specified on the abstract book of entries of said parish, made by the register of lands," and that same is located on what is familiarly known as "Terrapin Neck," and embraced in a plantation which is cultivated by the defendant, who resides in the State of Mississippi.

The further averment is that, on the 5th of July, 1836, this land was leased by the Trustees of the Public School Funds for ward one, of the *then* parish of Carroll, wherein the same was situated, to H. P. Morancy, for a term of fifty years; and that the present defendant acquired by mesne conveyances from Morancy.

That this title of defendant was vicious and defective, and on which no right by prescription could be founded; and that he was a mere naked trespasser, without color of right as owner.

The prayer is that the directors be recognized as owner, and placed in possession.

The defense is substantially

First. That plaintiff has not disclosed title in itself.

Second. Prescription of ten years.

I.

The following are the salient facts of the case, viz:

On the 5th of January, 1837, the school trustees of ward one of Carroll parish, in pursuance of an act of the Legislature relating to the disposition of school lands therein situated, entered into a notarial act authenticating a lease which had been made on the 18th of July 1835, at public auction, and whereof H. P. Morancy became the lessee, for a term of fifty years, of the land involved in this suit. This act was duly recorded on the second of February following.

On the 16th of June, 1845, Morancy conveyed by notarial act to William H. Edrington, the father of the defendant, a large tract of land, embracing the property in suit. This act contains the following recital, viz:

"It is understood that the said Morancy does not sell lot number six to the said Edrington in fee simple, nor warrant the title to the same, but simply transfers to said Edrington all the right, title and interest

School Directors vs. Edrington.

only that he acquired to a lease for fifty years, dating from the year 1837 or 1836."

This deed was recorded in the notary's book of notarial records, on the 1st of August, 1845, in the parish of *Carroll*.

An abstract of all the lands which had been sold or located within the limits of the parish of *Madison* was made, and duly certified by the register of the land office at Monroe, La., on the 19th of April, 1852, from which it appears that the land in dispute is entered and designated, in the column of "purchasers' names," as having been "selected for school's."

This abstract is found in the original "Abstract of Sales" book, on file in the office of the recorder of that parish. It is an exemplification of the records of the United States Land Office.

On the 4th of April, 1868, the sheriff of the parish of *Madison*, under an execution issued under a judgment in the suit entitled *Eliza M. Edrington vs. W. H. Edrington*, her husband, No. 446, passed a title to the plaintiff in the writ, for the said plantation which the defendant in execution had acquired, as above recited, from *Morancy*.

This deed, in terms, conveyed to the purchaser, her heirs and assigns, "all the right, title and interest of the said William H. Edrington," only, in said property. This deed was duly and seasonably recorded.

Mrs. *Eliza M. Edrington* died a few years subsequently, possessed of this title, and the defendant and his brother, as the only heirs, accepted her succession unconditionally. The defendant afterwards acquired his brother's interest. His title was, a few years later, expropriated for delinquent taxes, but it was redeemed.

II.

In our opinion the effect of the execution sale to Mrs. *Eliza M. Edrington* was to convey to her just the same title that her husband, *W. H. Edrington*, possessed; and it was a fee simple to all the plantation, except section six, and only his rights of lease to that for the remainder of the fifty years. That deed did not convey, or purport to convey, to the purchaser an *adverse* right to that of the defendant in execution, as tenant of the sixth section, as school lands.

The effect of her purchase was just the same as that of *Edrington* from *Morancy*, to substitute her in his place in the contract of lease.

Such being the character of her contract, and possession at the commencement, it could not be thereafter changed, by herself or her heirs, to the prejudice of his lessor. Such a title is not the "just title" that is mentioned in Revised Civil Code, 3848, *et seq.*

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Article 3485 declares that "prescription cannot be acquired under a title resulting from a lease, or loan, because these contracts do not transfer the *ownership* of the property."

It is therefore clear that the term of prescription in favor of the defendant—if at all—commenced only at the expiration of the Morancy lease, on the 18th of July, 1885.

III

A question is raised—as though it were an important one in this case—in regard to the registry of the title of W. H. Edrington from Morancy.

On the 1st of August, 1845, when that deed was put to record in the record book kept by the notary passing the act, there was no law which required it to be deposited, or recorded elsewhere. For the first time, the act of April 23, 1853, made it the duty of notaries in the *country* parishes "to deposit in the office of the parish recorders * * the original of all acts passed before them."

This act further provides that "said acts, when thus deposited in the office of the parish recorder, shall form a part of the archives of the same and shall immediately be recorded by him," etc.

Vide Article 2247 of Fuqua's Civil Code, and statute of 22d of April, 1853, No. 151, following.

Defendant's counsel insists, in his argument presented in brief, that because the lease of Morancy and his deed to Edrington were not recorded in the parish of *Madison*, within the territorial limits of which the property *now* is, same conveyed no notice to Mrs. Eliza M. Edrington, their ancestor, and hence the defendant must be considered to have purchased an *adverse* title.

This precise question was decided just the other way in *Hayden vs. Nutt*, 4 Ann. 65. The Court says: "This undivided interest was bought by Nutt from Dawson in 1835. * * This deed was recorded in the mortgage book in the parish of Carroll, where the land lay, in 1835. The parish of Madison, subsequently created, comprised these lands, etc."

Again, at p. 72: "We do not think that the right acquired by the inscription of this mortgage in the parish of Carroll was affected by the subsequent establishment of the parish of Madison, which embraced the lands mortgaged."

While that decision deals with the question of the registry of a mortgage, certainly no more onerous conditions could be imposed, in respect to the registry of conveyances.

This same principle was maintained in *Ellison vs. Iler*, 22 Ann. 470,

Singer vs. Sheriff et al.

with reference to the effect of a mortgage which had been regularly inscribed in the parish of Franklin against real estate afterwards incorporated into the new parish of Richland.

That is a sound principle of law.

Otherwise the Legislature, by the incorporation of property into a new parish, could with impunity destroy the rank of mortgages, and impair the obligation of contracts, at will.

We think the case was correctly decided in the court below.

Judgment affirmed.

No. 1198.

G. A. SINGER vs. J. E. MCGUIRE, SHERIFF, ET AL.

The Supreme Court has no jurisdiction over a controversy in which the matter in dispute is the nullity or validity of a judgment rendered for less than the lower limit of its appellate jurisdiction.

An appellee who has represented to this Court that a case was not within its jurisdiction and the Court has acted on that representation by dismissing the appeal; who subsequently acquiesces in this judgment and voluntarily permits, without any objection, the Circuit Court to hear and determine the same case; who afterwards applies for a prohibition to this Court to arrest the execution of the judgment of the latter court, but is denied the same, and who sues to annul the judgment, surely cannot be heard any longer to set up want of jurisdiction *ratione materiae* in the court rendering the judgment.

A PPEAL from the Fifth District Court, Parish of Ouachita.
Richardson, J.

C. J. & J. S. Boatner for Plaintiff and Appellee.

J. T. Ludeling for Defendants and Appellants.

ON MOTION TO DISMISS.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The appellee claims that this Court is devoid of jurisdiction *ratione materiae* over this controversy, as the matter at issue does not exceed two thousand dollars.

The object of this suit is to annul a judgment for some \$750, rendered by the Court of Appeals for the Second Circuit, the execution of which standing provisionally enjoined.

This judgment was rendered in a case in which, it is alleged, the amount in dispute exceeded, by an insignificant fraction, the upper limit of the jurisdiction of that court, and over which it had no authority.

It appears that, previous to the trial and determination of the case

40	638
110	878
110	880
40	638
115	489

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by the Court of Appeals, the matter in controversy had been brought up for adjudication to this Court; but that, on the representation of the appellees, among whom figured conspicuously the present plaintiff, that this Court had no jurisdiction, as no judgment could, in any contingency, be rendered against any of the appellants for a sum exceeding \$2000, the appeal was dismissed *proprio motu*. State National Bank vs. Allen, 39 Ann. 807.

The natural consequence of this dismissal was the assumption of jurisdiction by the Court of Appeals over the cause and the determination by it of the issues involved in it.

It is an important factor in this litigation that subsequently, when the case appeared before the Circuit Court, it was tried and determined, in the absence of all objection on the part of the present plaintiff, who was then, as he had been, before this Court the main appellee.

It is another significant circumstance that, after the Circuit Court had rendered judgment for some \$750 against the plaintiff, he applied for a prohibition to this Court to arrest the execution issued on the judgment and which was in the hands of the sheriff, and to prevent the court from exercising any jurisdiction over the case, the application resting on the ground that the Court of Appeals had no jurisdiction to render the judgment, as the amount involved in the case exceeded the upper limit of the jurisdiction of that court.

This Court refused the prohibition, on the ground that, as the relator had represented to it that the case was not within its jurisdiction, the appeal had been dismissed on that showing, and the case had been tried and determined by the Circuit Court without any objection on his part, *he was estopped* from questioning the jurisdiction of that court and could not be heard any longer to complain on that score.

It was never held, for under no circumstances could it have been, that by his consent the plaintiff had conferred jurisdiction on the Circuit Court in the case in question.

This Court simply denied relief, because the relator then, who is the plaintiff here, was *estopped*, and it did not lie in his mouth to contest the validity of the judgment attacked as rendered by an incompetent court. State ex rel. Singer vs. McGuire et al., 40 Ann. p. 378, decided in New Orleans in March last.

It needs no reasoning to show that the appeal taken in this case cannot stand in this Court, the matter in dispute being the validity or nullity of a judgment for a sum beneath the lower limit of its jurisdiction.

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It is manifest that the appellant, who is the judgment creditor, entertained serious doubts touching the appealability of the case to this Court, as a similar appeal was sought and obtained to the Circuit Court by which the judgment levelled against him was rendered.

The appellant, by the dismissal of the appeal here, is not left without hope for relief, as the certainty is that the judgment of the Court of Appeals must set the matter now agitated forever at rest.

It is, therefore, ordered and decreed that the appeal herein be dismissed with costs.

No. 1,200.

S. MEYER VS. JOHN T. LUDELING.

A submission to arbitration of the matter, embraced in a subsequent litigation, and a suit in affirmance of the award, praying that it be made executory, constitute a legal interruption of prescription.

A PPEAL from the Fifth District Court for the Parish of Ouachita,
Richardson, J.

C. J. & J. S. Boatner for Plaintiff and Appellee.

Franklin Garrett & John T. Ludeling for Defendant and Appellant.

The opinion of the Court was delivered by

WATKINS, J. The plaintiff sues upon open mercantile accounts for goods, wares and merchandise furnished by him during the years 1884 and 1885. Deducting a credit of \$7,044.45 he claims a balance of \$3,845.02.

In limine the defendant tendered a plea of three years' prescription against each and every item of the several accounts, and it was separately tried and overruled.

The defendant's answer sets up the general issue and a full settlement of accounts up to and including 1883.

He avers that in the spring of 1884 "he entered into an agreement with the plaintiff to purchase certain supplies for plantation use from them, under the following terms and conditions, to-wit: Ten per cent to be added to the cost for meat and tobacco, to be paid for at the end of the year; for dry goods and supplies, except meat and tobacco, he was to pay cash, the price to be ten per cent added to cost."

He avers that, in pursuance of said arrangement, he had, up to the

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middle of June, 1884, "settled for all amounts represented by plaintiff's bills to be due for cash purchases," in cash and drafts.

That on or about the 24th of June, 1884, he purchased a bill of merchandise and delivered to him a lot of wool "to be sold by plaintiff for defendant, and the proceeds of sale applied" thereto; and that no account has been rendered to him thereof, and plaintiff owes him therefor.

He then avers "that notwithstanding the said judicial settlements, plaintiff's accounts erroneously contain charges for articles alleged to have been purchased within the periods for which defendant had settled;" and, though requested so to do, plaintiff failed to give him bills of the merchandise from time to time.

Complaint is made of "the charges for freight bills," as being erroneous and unauthorized, and he avers that "in all instances (he) reimbursed plaintiff, and as soon as he was informed of such payments." He specially avers that the charge of \$15.00 for peas was reimbursed. The defendant then represents that he delivered to plaintiff in 1884 and 1885, 277 bales of cotton, of which 265 were sold him and twelve were consigned for shipment and sale for his account; that in January or February, 1885, he delivered him six additional bales, for which plaintiff has rendered him no account, "nor have the proceeds been credited" to him on account; that, in like manner, other cottons were delivered to him for sale on account and of which he has received no return.

He "avers that plaintiff held the proceeds of the sale of all of said cotton hereinabove described, as a special deposit for (him) and that they owe him for the proceeds \$12,430.98," for which he prays judgment in reconvention against the plaintiff, with legal interest; and he also prays that plaintiff's demands be rejected.

After a protracted trial, and a full investigation of the accounts of the parties *pro* and *con*, and the vast amount of parol and documentary evidence, the judge *a quo* rendered judgment in favor of plaintiff for the amount claimed, subject to a credit of \$559.32, and from this judgment the defendant has appealed. In this court the plaintiff and appellee has answered the appeal and demanded that the judgment be increased in his favor.

I.

The first question for us to determine is that of prescription. The date at which prescription *liberandi causa* begins to run on open mercantile accounts is at their maturity, that is, at the end of the year in

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which they are contracted. On this question there is no dispute. This suit was filed and service of citation made on the defendant, in person, on the 3rd of January, 1888. Hence all items of indebtedness which were contracted on any date, either in 1883 or 1884, became prescribed on the 31st day of December, 1887—three days antecedent to the service of citation on the defendant—unless same was interrupted in some of the modes provided by law. Those contracted in 1885 were saved from prescription by this suit.

The first point made by plaintiff's counsel is that, at different times, and reasonably, the various accounts were rendered to the defendant, and that same were not specifically denied or disavowed by him, and that, on that account, and in that manner, same acquired the character and *status* of "stated accounts" which are only prescribed in ten years.

His petition makes mention of these as the "several accounts * * for the years 1884, 1885 and 1886." Special mention is made of the \$262 balance of account of 1883, as having been rendered, but of no other account. This was a much mooted question, on the trial of the plea, and we think a fair preponderance of the evidence shows that such of the accounts as were rendered were disputed, and payment was refused, in part at least.

But we are of the opinion that the arbitration proceedings and the suit to enforce the payment of the award of the arbitrators constitutes a legal interruption of prescription, and that the current of prescription remained suspended during their pendency.

A submission of the identical matters litigated in this suit was made to arbitrators, and they were sworn on the 18th of November, 1886. They made and signed an award on the 8th day of April, 1887. On the 20th of August, 1887, the present plaintiff sued in affirmance of the award, and prayed a judgment rendering it executory.

On an exception tendered by the present defendant the judge who tried and decided this cause, tried and maintained the exception on the *sole* ground that the arbitrators failed to make their award within three months, and that the umpire did not appear to have been sworn.

The code provides that a legal interruption of prescription takes place when the debtor "has been cited to appear before a court of justice * * whether the suit has been brought before a "court of competent jurisdiction or not." R. C. C. 3518.

In the case of *Satterly vs. Morgan*, 33 Ann. 846, this court entered into an extensive examination of adjudicated cases under this article of the code, and, upon most careful consideration, held that there is a

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clear "distinction between the technical sufficiency of a citation as a "basis for the maintenance of proceedings and judgment, and its sufficiency for the purpose of interrupting prescription."

The same can be as correctly said of the character of the suit.

An arbitration is a covenant by which persons who have a *law suit* or difference with another, select arbitrators to decide the matter. R. C. C. 3099.

They may submit "a law suit already instituted, or only in contemplation." R. C. C. 3102.

"The arbitrators ought to determine as judges, agreeably to the "strictness of law." R. C. C. 3110.

We think it is clear that the proceedings of arbitrators are *quasi* judicial. During the pendency of their proceedings plaintiff's right of action for the enforcement of his demands, in the courts, was suspended; and hence prescription was suspended, if not interrupted, thereby.

The defendant's counsel claims that the plaintiff dismissed his former suit *voluntarily* and that he thereby lost the benefit of the interruption, if any was produced thereby. Not so; the judge *tried* the defendant's exception and sustained it and rendered an interlocutory judgment dismissing the suit as of non-suit, and with a full reservation of plaintiff's right "to sue upon the matters embraced in the submission."

We are of the opinion that the judge *a qua* correctly overruled defendant's plea of prescription.

II.

On the merits, the principal contention of defendant's counsel is that the plaintiff has not introduced a sufficient amount of *positive* proof to entitle him to judgment.

That while it is true that the plaintiff, as a witness, states emphatically that the accounts are correct, yet he, upon cross-examination, admitted that he did not know that of his own personal knowledge, but that he knew that the accounts were drawn from his books, and that they were correctly kept. His contention is that a merchant's books are not evidence in his favor and hence parol evidence cannot be. This is a *non sequitur*.

The testimony of the proprietor that he knows that his books are correctly kept is not proof of their *contents*, but that their *contents* are correct. This is certainly competent, if not sufficient evidence, when taken in connection with the books. Now, the accounts are the mere exemplifications of the books, and his statement is that the accounts

Meyer vs. Lndeling.

have been correctly kept, to his knowledge. In addition to this, all of these accounts were rendered to the defendant years ago, and while it is true that he did not remain silent, and thus acquiesce in their correctness, yet he did make *only* a few objections to some of the items. Those items not objected to were certainly admitted. The quotations we have made from his answer clearly admit that there were dealings between himself and plaintiff in those years. In the spring of 1884, he represents and judicially admits that there was an agreement between himself and the plaintiff, whereunder the latter undertook to furnish him plantation supplies upon certain specified terms. He again states that he settled for all amounts represented by the plaintiff to have been purchased for *cost*, up to the 24th of June, 1884; that he delivered him a lot of wool for sale, and that the plaintiff had agreed to sell the wool and place the proceeds to his account; that "notwithstanding he had made periodical settlements, plaintiff's "accounts erroneously contain charges for articles alleged to have "been purchased within the periods for which he settled;" that the charges made in the accounts for freights paid are erroneous and unauthorized.

In addition to all of these guarded admissions in the defendant's answer, clearly admitting the truth and genuineness of the accounts, with limited exceptions, there is other evidence in the record which it is unnecessary for us to detail, which seems to fortify and strengthen the conclusion that the district judge has done ample and exact justice in the premises. Amongst others, one incident may be cited, and that is, the award of the arbitrators which places about the same estimate upon the defendant's indebtedness as the judgment appealed from does. While it was not offered in evidence for the specific purpose, yet it is in the record, and we may give it consideration as a circumstance that may be placed in the scales before striking the balances.

But without any of these circumstances being considered, the plaintiff's own statement made on cross-examination, in the absence of other testimony, would be ample. It is as follows, viz:

"Q. Did you sell the articles enumerated in your accounts?

"A. I think I did. Not all of them myself.

"Q. Do you know the particular ones you sold?

"A. Not the specific articles.

"Q. Do you know of your own knowledge that they were sold?

"A. I saw the majority of them sold."

These statements are corroborated by the evidence of Herman

Ludeling vs. Chaffe et al.

Meyer and Solomon Meyer. The latter states emphatically that he delivered these accounts to the defendant and that he made no objection to them at that time or subsequently.

Altogether, we are of opinion that the accounts are substantially proven, and that the credit allowed defendant in addition to the credit of \$7044.45 allowed by the plaintiff on the face of the account and before suit, is all that he is entitled to.

Judgment affirmed.

No. 1,201.

JOHN T. LUDELING vs. J. & C. CHAFFE, ET AL.

40	645
48	767
49	1335
40	645
112	58

Where plaintiff has brought a hypothecary action against a third possessor for the recognition of his mortgage on property held by the latter, and for a decree that the property be sold to satisfy the same, and has recovered contradictory judgment to that effect, which has become final, and has issued execution thereon, said judgment is *res judicata* as to all antecedent matters which he urged, or might have urged, as defenses in said suit; and he cannot set them up again as grounds for an injunction against the execution of the judgment.

When a judgment of revival of a judgment against a bankrupt debtor has been rendered contradictorily with the assignee in bankruptcy who has been cited and has answered, such judgment cannot be treated by a third person as an absolute nullity and collaterally attacked without any action or prayer to annul it. The propriety of such a proceeding finds countenance in several decisions of this Court, and presents a grave question, which it is to be assumed was considered and passed upon by the judge who rendered the judgment.

Other questions considered and determined.

A PPEAL from the Fifth District Court, Parish of Ouachita.
W. F. Millsop, Judge *ad hoc*.

Plaintiff and Appellant *in propria persona*.

Stubbs & Russell and C. J. & J. S. Boatner for Defendants and Appellees :

In a motion to revive a judgment against a person since deceased, and who had made a surrender in bankruptcy, the assignee is the proper person to cite. Stackhouse vs. Zunts, 36 Ann. 529.

Until an assignee or executor files his final account and is discharged, he still preserves his official function, though there may be no property to administer. 35 Ann. 1023.

A motion to revive a judgment is not a new suit, but a mere continuance of a pending cause. A curator may therefore be legally appointed to represent the absent defendant, though he have no property in the State. The court obtains jurisdiction by the original service of the original citation. 33 Ann. 314.

A final judgment of a court of competent jurisdiction imparts absolute verity, and cannot be attacked or questioned collaterally. Kent vs. Brown, 38 Ann. 813, and cases there cited.

The third possessor of property is not entitled to rents and revenues after judicial demand.

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The seizure under the *fi fa* herein cuts off plaintiff's right to the use of the property unless he elects to pay the debt for which it was seized. See authorities cited 2 Hen. p. 1195.

The third possessor is not entitled on eviction to demand the value of improvements placed upon property by his vendor, when he has called his vendor in warranty and obtained judgment for the full amount of the purchase price. 11 Ann. 501.

An injunction cannot issue on grounds which were or might have been pleaded before judgment. 12 Ann. 197, 313; 6 Ann. 252; 8 Ann. 6, 489; 13 Ann. 112, 374.

An injunction cannot issue to regulate the effects of a seizure with reference to a mortgage or privilege. The proper remedy is the third opposition. 5 R. 496; 10 R. 28; 2 Ann. 762; 11 Ann. 275; 14 Ann. 404.

An injunction based upon the ground that the sheriff had not obeyed the instructions of defendant, with respect to the advertisement, will not be sustained when other grounds are alleged which prevent the change of advertisement to correspond with plaintiff's directions, and arrest the sale until the court passes on the same.

The law giving the defendant the right to select the paper in which the advertisement shall be inserted is merely directory, and its violation gives no ground for injunction except on allegation of irreparable injury.

The opinion of the Court was delivered by

FENNER, J. This is an injunction suit to restrain the execution of a judgment rendered against plaintiff and affirmed by this Court in a certain suit entitled J. & C. Chaffe vs. Ludeling, reported page 962 of 34th Annual Reports. J. & C. Chaffe were recorded judgment creditors of Mrs. E. C. Warfield, and the suit just referred to was a hypothecary action brought against Ludeling as third possessor of certain property claimed to be subject to their judicial mortgage, and judgment was asked recognizing their mortgage on the said property and decreeing it to be sold in satisfaction thereof. Defendant interposed a plea of discussion and other defenses, which were overruled for reasons given in the opinion, and judgment was rendered recognizing the mortgage and condemning Ludeling "either to pay the judgment with the costs thereof or to give up the land to be sold therefor."

This judgment was affirmed by this Court.

It is too obvious to admit of serious discussion that this judgment absolutely and finally settled, as between the Chaffes and Ludeling, the right of the former to require Ludeling to pay off their mortgage debt or to sell the land for the satisfaction thereof. Ludeling has had his day in court on this issue and was bound to urge all his defenses, and his mouth is closed as to all matters antecedent to the judgment which he urged or might have urged against its rendition.

In his present petition for injunction he sets up a multitude of matters which were either pleaded or might have been pleaded as grounds for denying or qualifying the above absolute judgment, as to all of

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which the judge *a quo* sustained the plea of *res judicata*; and we consider his ruling to be clearly correct.

The plaintiff, however, assigns other grounds for his injunction, arising subsequently to the judgment, which require consideration.

I.

He pleads that the judgment of the Chaffes against Warfield, the record of which is the basis of their mortgage on his property, is perempted and prescribed.

Unless it is prescribed there is no foundation for the plea of peremption, the reinscription having been seasonably made.

The question of prescription depends upon the validity and effect of the proceedings taken by the Chaffes to revive their judgment against Warfield. These proceedings were taken in proper season before the lapse of ten years from the rendition of the judgment.

Article 3547 C. C. provides: "All judgments for money shall be prescribed by the lapse of ten years from the rendition of such judgments. Provided, however that any party interested in any judgment may have same revived at any time before it is prescribed, by having a citation issued according to law, to the defendant or his representative, from the court which rendered the judgment, unless defendant or his representative show good cause why the judgment should not be revived, and if such defendant be absent and not represented, the court may appoint a curator *ad hoc* to represent him in the proceedings, upon which curator *ad hoc* the citation shall be served. Any judgment revived as above provided shall continue in full force from the date of the order of court reviving the same, etc."

The defendant, Mrs. Warfield, had removed from the State and died, and had no heirs resident in the State or property situated therein. Prior to her death she had made a surrender in bankruptcy, and her assignee in bankruptcy was still in office, having never been discharged.

In their petition for revival the Chaffes represented the death and bankruptcy of Mrs. Warfield and the non-residence of her heirs; alleged that W. T. Atkins had qualified as assignee of her estate and has never been discharged; set forth the non-residence of her heirs and prayed that "if they were in any sense her representatives" a curator *ad hoc* should be appointed to represent them; asked that the assignee and the curator should be cited, and for judgment reviving the judgment. A curator was accordingly appointed. Atkins, the assignee, was duly cited and appeared and filed answer. The curator accepted service of the petition and waived citation, but appeared and filed

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answer. On issue thus joined the court regularly tried the case and rendered a judgment of revival, which is now final.

The plaintiff in injunction has never brought suit to annul this judgment. Even in his present action he has offered no prayer to have the judgment annulled, nor has he brought in any of the parties thereto except the present defendants. He simply treats it as an absolute nullity for want of citation.

It is undoubtedly true that a judgment rendered without citation is a nullity so absolute that it may be invoked in any proceeding and by any one interested.

But here, so far as the assignee is concerned, there was a perfect citation followed by appearance and answer. The petition advised the Court of the grounds on which it was claimed that such assignee was the proper representative of the judgment debtor, contradictorily with whom the proceedings in revival should be carried on. It may be assumed that the Court, in rendering its judgment, considered and determined that he was the proper representative of the judgment debtor.

The question as to his capacity to represent the bankrupt debtor in such proceedings is, under the jurisprudence of this Court, to say the least, a doubtful one.

In the case of *Alter vs. Nelson*, 27 Ann. 342, which was a suit to revive a judgment against a bankrupt, it was held that citation of the latter was unavailing and certainly suggested, as the only alternative, that the assignee was the proper party.

In *Wheless vs. Fisk*, 28 Ann. 731, where bankruptcy occurred pending a suspensive appeal, it was held that plaintiff had a right to proceed in order to preserve his right against the surety on the appeal bond, and the Court, of its own motion, ordered the assignee to be made a party, and rendered judgment contradictorily with him.

Serra vs. Hoffman, 29 Ann. 17, was precisely similar to the last, and it was held that the assignee could not be made a party.

Chapman vs. Nelson, 31 Ann. 341, certainly says that the assignee is not a necessary or proper party in a proceeding to revive a judgment against a bankrupt, but the *dicta* on that point were *obiter* because the case went off on the question of jurisdiction of the Court.

In the case of *Grayson's Executor vs. Morton*, later than the foregoing, the proceeding was to revive a judgment against a bankrupt by citation of the assignee alone. It was first held that it could not be done, but, on rehearing, on the ground of *stare decisis*, it was held that the proceeding was proper and valid. *Manning's Unr. Cases*, p. 187.

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In the case of Grayson's Executors vs. Morton, 33 Ann. 1018, we quoted at length from the last mentioned decision and indicated our approval of it where the assignee was still in office, but held it could not apply when the assignee had been discharged.

Finally, in a very recent case, which was also an action to revive, we said on the foregoing authorities: "We think the assignee was properly made a party to the action and the only one that could represent the bankrupt debtor or his estate."

Stackhouse vs. Zuntz, 36 Ann. 529. If there be error in these decisions, it is one which originated long ago and which has been perpetuated on the ground of *stare decisis*, to protect parties who have acted upon this jurisprudence as a means of saving their judgments from destruction by prescription. The question involves nothing but a method of proceeding in order to interrupt prescription, which is subject to the arbitrary control of the Legislature, and no class of cases invokes so strongly the application of *stare decisis*.

In a proper case we might review them and might consider the distinction between bankrupts who have secured their discharge and those who have not; though the bankrupt who does not plead his discharge is just as amenable to suit as if undischarged, and in several of the cases the bankrupt had not been cited at all.

At all events, and without finally committing ourselves on all these questions, it is obvious that the judgment of revival here invoked is not infected with any nullity so absolute as to authorize it to be questioned by a third person in this collateral way; but that its validity depends on a grave question of proceeding, the propriety of which seems to be sanctioned by the judgment itself. This obviates the necessity of considering the validity of the proceeding as against the curator under his waiver of citation.

The defense of prescription was, therefore, properly overruled.

II.

The objections as to the form of the execution and the failure of the sheriff to advertise the sale in the paper suggested by the defendant in execution, have been elaborately considered by the judge *a quo* and we consider his reasons for disregarding them sufficient. The defendants in this case are not responsible for the sheriff's default in the matter of the advertisement, and it may be corrected in the future proceeding which will be necessary. Had it been the sole ground of the injunction it would doubtless have been corrected as soon as suggested.

III.

Plaintiff claims credit for the enhanced value of the property arising from the improvements made, not only by himself, but by his immediate vendor, the succession of Dinkgrave, his warrantor. He has already recovered judgment against his warrantor for the full price paid by him, which naturally includes the value of the improvements made at the date of the sale. He certainly cannot claim the value of Dinkgrave's improvements out of the sale and, at the same time, hold a personal judgment against his succession for the same value. He may subject this value to his uncollected judgment against Dinkgrave, but he cannot directly claim it.

The whole of this claim should have been asserted against the proceeds of the sale, and had no place in this injunction suit; but the judge *quo* recognized plaintiff's claim to the value of his own improvements and, as no amendment is asked in that respect, it must stand.

Defendants' prayer for an amendment allowing them a judgment for rents and revenues has no foundation in the pleadings and cannot be allowed in this proceeding. Nor do we think it proper to amend the judgment as to damages.

Judgment affirmed.

No. 1194.

L. D. SPEARS VS. HIS CREDITORS.—J. R. FULLER & Co., OPPONENTS.

Any creditor may oppose the appointment of a syndic, or charge fraud against the insolvent debtor, by means of an opposition laid before the Court within ten days next following the meeting of creditors.

The acceptance of an insolvent's surrender and the selection of a definitive syndic by a meeting of his creditors, cannot conclude judicial inquiry into the legality of the syndic's appointment or a charge of fraud against the insolvent.

At such a meeting of the creditors of the insolvent, their respective claims are certified on oath to be true and legitimate, and such certification of their claims entitles them to vote. This is an *ex parte* proceeding before a notary public possessed of no judicial powers, and cannot operate as an estoppel or *res judicata* in respect to subsequent judicial proceedings.

At such a meeting of creditors only two questions can be presented or determined—one is the acceptance of the insolvent's surrender and the other is the selection of a syndic.

Before any proceedings can be taken looking to the sale of the property of the insolvent, and the application of the proceeds to his debts, it is necessary that a syndic should have been qualified and an order of court for the sale obtained. As an incident of such proceedings, a meeting of creditors must be called for the purpose of determining the terms and conditions of sale.

Mortgaged and privileged creditors are not bound by the decision of the majority of other

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Spears vs. His Creditors.

creditors, whether they desire the property effected with their liens to be sold for cash or on terms of credit in satisfaction thereof.

Privileges must be ascertained and settled contradictorily with all the creditors. Creditors cannot litigate their demands separately against the syndic, or in an opposition to the appointment of a syndic.

A PPEAL from the Third District Court, Parish of Claiborne.
Young, J.

Everett & Everett and McOlenon & Seals for Opponents and Appellants:

Res adjudicata cannot be raised as to a question which was not made an issue, and which has not been adjudicated upon.

Estoppel is founded upon the principle that a party is bound by his previous actions, admissions or allegations; so where he has a vendor's privilege and fails to ask for and have it recognized in the judgment, he is not afterwards estopped from claiming his privilege in a contest with other creditors. 29 Ann. 841; 32 Ann. 826, 827.

The renewal of a note for the purchase price of machinery and fixtures does not novate the obligation. To effect a novation the intention of the parties must be expressed. Novation is never presumed. C. C. Art. 2190, 2185 *et seq.*; 34 Ann. 534; 32 Ann. 822; 24 Ann. 193; 6 R. 443; 4 R. 493; 8 M. 431.

The privilege of the vendor springs from the nature of the debt, and exists by force of law, and where a judgment creditor is clothed by law with such a privilege, the mere absence of any expressed recognition of the privilege of the judgment of the court does not impair the lien. 32 Ann. 826, 827; 29 Ann. 841.

In insolvent proceedings, privileged creditors have the right to dictate how the property on which they have a privilege may be sold. They are not premature in asserting this right before the property is sold and the funds ready for distribution by the syndic. R. S. Sec. 1800.

Where an insolvent files an application for a surrender, and alleges himself to be doing a farming and milling business and engaged also in merchandising, and he fails to surrender his books of accounts, notes, etc., without assigning any good reason for withholding them, his petition will be rejected and his surrender denied. 8 L. 318; 1 R. 170.

Where the ceding debtor fails to surrender all of his property or goods, or gives an unfair preference to some creditors, his petition will be rejected. R. S. Sec. 1804, 1786.

J. W. Holbert, contra.

The opinion of the Court was delivered by

WATKINS, J. Fuller & Co. oppose the cession of their insolvent debtor, Spears, and the homologation of the proceedings of a creditors' meeting, whereat a syndic was chosen and the terms for the sale of his property fixed on the following grounds, viz:

1. That they were placed on the insolvent's schedule of debts as ordinary creditors, when they should have been placed thereon as creditors with vendor's lien and privilege on a certain steam-mill, engine and fixtures which are included amongst the property surrendered.

Spears vs. His Creditors.

2. That Jacob Stein & Co. were placed upon said schedule as creditors, when they were not, in fact.

3. That just prior to making his surrender, the insolvent favored some of his creditors, to their prejudice and injury, by giving them property in satisfaction of their demands, and "this was an unfair preference, working an injury to the rest of his creditors."

4. That the schedule of his assets did not include the whole of the insolvent's property.

5. That the insolvent did not produce, and on proper demand therefor, failed and refused to produce and surrender "his books, accounts, notes, etc., for inspection."

Opponents substantially aver that, in so doing, the insolvent was guilty of such fraud as should deprive him of the benefits of the insolvent law.

The insolvent denies all of these charges; alleges that he made a fair and faithful surrender of his property, and avers that all those who are placed on his schedule are really and actually his creditors.

He also pleads *res judicata*, estoppel, payment and novation.

The demands of opponents are rejected in the court below, and they have appealed.

I.

The pleas of estoppel and *res judicata* are predicated on the proceedings of the creditors at the general meeting, whereat the surrender of the insolvent was accepted, a definitive syndicate chosen, and the terms of sale of property regulated.

It is the homologation of those proceedings which is resisted by opponents.

The pleas are not well founded. The law provides that "should any creditor of an insolvent debtor deem it necessary to oppose the appointment of a syndic or to charge fraud against the debtor, he shall, *within ten days next following the meeting of creditors*, lay before the court his written opposition, stating specially the several facts of nullity of the appointment or fraud alleged against the insolvent debtor." R. S. Sec. 1802.

It is obvious, therefore, that the acceptance of an insolvent debtor's surrender by a majority of his creditors in number and amount does not preclude enquiry into the legality of the syndic's appointment, much less the examination of a charge of fraud preferred against the debtor.

Express permission is given by the statute to "any creditor * * to oppose the appointment of syndic or to charge fraud against the

Spears vs. His Creditors.

debtor " *after* the meeting of the creditors have accepted the surrender and selected a syndic.

On such proceedings no question of fraud or nullity is raised. The statute provides that "at the meeting of the creditors, *after having certified on oath their respective claims to be true and legitimate, they shall proceed to the appointment of a syndic.*" R. S. 1796.

Such certification on the oath of the respective creditors is necessarily *ex parte*. It is made before a notary public possessed of no judicial power whatever. It would be anomalous, indeed, to hold that such a proceeding could estop or debar judicial inquiry. It is only after the insolvent's surrender has been formally acted upon and accepted by his creditors that those dissatisfied therewith are called upon to make opposition.

The pleas of *res judicata* and estoppel cannot prevail.

II.

An examination of the *proces verbal* of the proceedings of the meeting of the creditors discloses the fact that not alone was a definitive syndic elected, but the terms of sale of the insolvent's property were fixed, and same was ordered to be sold, subject to such privileges as may exist thereon according to law, the amount of all bids less than ten dollars payable in cash, and those in excess of that sum payable on the first of November following.

Opponents complain of this part of the proceedings on the ground that the creditors had no authority "to fix the terms of sale of the machinery," etc., on which they assert a vendor's privilege.

The petition of the insolvent, which accompanies this schedule, shows that he desired to make a voluntary surrender of all of his property to his creditors, and that for the purpose of laying before them a statement of his affairs, a meeting of his creditors should be called. It is accompanied with a prayer that a meeting of his creditors be convoked before a notary public, at a time and place to be indicated, at which time and place he might "lay before them his affairs and surrender to them his property," and that in the meantime all proceedings against his person and property should be stayed. The order of court followed the averments and prayer of the petition.

It is apparent that the creditors had not, at this stage of the proceedings, any right to fix the terms of sale of the property of the insolvent. Under the prayer of the petition and order of the court, there were but two questions submitted to their consideration, and those were, 1st, the acceptance of their debtor's surrender, and, 2d, the

Spears vs. His Creditors.

selection of a definitive syndic. This was the only power given to such a meeting of creditors. R. S. Sec. 1796.

Of course, it was absolutely necessary that the creditors should first accept their debtor's surrender and choose some one to undertake the administration of his estate, and that he should have qualified and entered upon the discharge of the duties of his office before any proceedings could be taken looking to the sale of the debtor's property, and the application of the proceeds to the payment of his debts.

These things having been done, the property ceded may "be ordered by the court to be sold at public auction, at such time and place and upon such terms and conditions as may be determined by the creditors." R. S. 1812.

But such order must be preceded by a petition of the syndic, and when presented the court will convoke a meeting of the creditors *for that purpose*. The mortgaged and privileged creditors shall not be bound by the decision of the majority of the other creditors, if they desire the property affected with their liens to be sold on a credit. They have, also, the right to require that a sufficiency thereof be sold for cash to satisfy their privileged claims. R. S. Sec. 1800.

The proceedings of the creditors' meeting, in so far as they relate to the fixing of the terms of the sale of the insolvent's property are premature, and, on that account, are null and void. For this reason we do not feel authorized to decide whether opponents are entitled to the recognition of their vendor's lien or not. It must be relegated to some future proceeding and determined contradictorily with other creditors of the insolvent.

The total assets surrendered are stated to be worth only \$2800, and the insolvent's debts are placed at \$3800. If the claim of opponents is recognized as being secured by a vendor's lien, and entitled to be paid by preference, a large portion of the assets will be absorbed thereby, and the amount applicable to ordinary debts correspondingly reduced. Hence, ordinary creditors have an interest in the determination of this question.

In *Finney vs. Provosty, Syndic*, 14 Ann. 218, it was held that "privileges must be settled contradictorily with all the creditors upon a tableau of distribution filed. The creditors cannot litigate their demands separately against the syndic." *Faber vs. McRae and Provosty*, 14 Ann. 657, and authorities therein collated; *Robert vs. His Creditors*, 2 Ann. 535.

III.

A fair preponderance of the testimony favors the validity of the debt of Jacob Stein & Co. that is entered upon the insolvent's schedule. It is at least sufficient to justify the insolvent in placing it there and to exonerate him from the charge of fraud that opponents have preferred against him on that account. But we do not hold that the proof submitted in reference to this claim can, in any manner, affect the rights of other creditors. The validity of said debt, as such, must, like the question of opponents' privilege, be relegated to future adjustment.

IV.

On the charge preferred against the insolvent of having given goods and property to some of his creditors in satisfaction of their demands, no proof was adduced by opponents. They rest this branch of their case exclusively upon the admissions made by the insolvent in his evidence.

They are to the effect, substantially, that shortly anterior to making his surrender, his saw-mill was destroyed by fire and he collected \$1648 insurance money. This he expended for goods, in payment of plantation supplies, and in making payment of some small debts he owed. To his answer is appended an itemized statement of such expenditures.

He admits that he gave small amounts of goods in exchange for labor, corn and other things, and that he paid a few small debts that he owed in goods. But the amount of the debts thus paid was quite small. He states that, at the time of his surrender, he had none of the insurance money on hand; that he had no intention of defrauding his creditors in thus expending his money and disposing of his goods; that his mercantile business was quite small—his stock scarcely exceeding \$300 at any time.

He says "the goods and their value were used by myself and family and mill-hands and farm-hands—and I sold a part of them. The amount disposed of and the amount on the schedule under seizure, accounts for all the goods I had on hand. I had no money or amounts due for goods, or goods that were not surrendered."

There is no countervailing evidence. Some of his neighbors testify to his good reputation and character.

We think it would be a strained interpretation of these acts of the insolvent debtor to style them fraudulent in the sense of the provisions of R. S. Sec. 1802 *et seq.* On the contrary, they indicate

Spears vs. His Creditors.

an intention to satisfy his debts just as speedily as possible, consistent with his slender resources. It was the seizure of his property by the opponents, which brought about his surrender. This ground of opposition is untenable.

V.

The proof satisfies us that the schedule fairly accounts for all the insolvent's property.

VI.

The insolvent states that he kept no mercantile books. The only one he did keep was a small memorandum book, and this he tendered to the opponents in court. He evidently does not come within the denunciation of the statutes against "those who, being merchants and shop-keepers, shall have concealed their commercial books and papers * * * with the intention of keeping same from their creditors." R. S. Sec. 1802.

VII.

We have taken the pains to review with care all the points of objection urged *pro* and *con*, and have reached the conclusion that the action of the creditors in fixing the terms of sale of the insolvent's property was premature and unauthorized, and that, in this respect their proceedings should be annulled; that the questions raised with regard to the alleged privilege of the opponents, and the validity of the debt of Jacob Stein & Co., should be postponed until the *concurus* is formed and adjudicated therein contradictorily with all the creditors; and that the judgment should be, in other respects, affirmed.

It is therefore ordered, adjudged and decreed that the judgment appealed from be so amended as to reject and annul that part of the proceedings of the creditors' meeting which fixes the terms of sale of the insolvent's property; and further amended so as to postpone consideration of the opponent's privilege, and the validity of the debt of Jacob Stein & Co. until a *concurus* is formed with all the creditors.

It is further ordered, adjudged and decreed that in all other respects said judgment be affirmed, and that the costs of appeal be taxed against the succession of the insolvent, and those of the lower court to await the final termination of proceedings in the court *a qua*.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT OF LOUISIANA,

AT
OPELOUSAS,
IN
JULY, 1888.

JUDGES OF THE COURT:

HON. EDWARD BEEMUDEZ, *Chief Justice.*

HON. FÉLIX P. POCHÉ,
HON. CHARLES E. FENNER,
HON. LYNN B. WATKINS,
HON. SAMUEL D. McENERY,

} *Associate Justices.*

No. 1,311.

J. A. BOYER vs. L. A. JOFFRION, SHERIFF, ET ALS.

A money lender may safely deal, as far as the question of ostensible ownership goes, with one whose title to real estate properly appears on the public records and cannot be affected by any anterior transfer of the property, unless the same was made by the ostensible owner, his authorized agent, or by judicial authority, and the transfer was patent by proper registry.

Such party cannot be charged with notice, unless the notice result from a valid registry of the transfer, and is not bound by judicial proceedings in which the title of the property is involved, but to which he was no party. Notice, as a rule, is not equivalent to registry.

On the dissolution of an injunction, arresting an order of seizure and sale, not a money judgment, damages cannot be allowed.

Mr. Justice Poché was absent during this term on account of illness.

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 Boyer vs. Sheriff et als.

A PPEAL from the Twelfth District Court, Parish of Avoyelles.
Coco, J.

Joffrion & Bordelon for Plaintiff and Appellant.

Thorpe & Peterman for Defendants and Appellees:

1. Plaintiff in suit is not entitled to call his vendor in warranty, 19 L. 368; C. P. Art. 378 *et seq.*; 2 Ann. 271; *Ibid* 755; 15 L. 471; R. C. C. Art. 2519; 9 Ann. 367; Cross on Pl. 432.
2. That the warranty shall have existence, it is necessary that the right of the person evicting shall have existed before the sale. R. C. C. 2478; 18 Ann. 560.
3. A sale of land without description of boundary or location is inoperative as notice to the public 37 An. 751; 8 Ann. 283; 10 Ann. 193, 327, 613; 11 Ann. 87.
4. A sale of immovable property by private act has no effect against third parties until actual delivery to the vendee of the thing sold. R. C. C. Art. 2442.
5. An act under private signature dates only from the time of its production in the absence of evidence *aliunde* of its real date.
6. A sale of immovables by private act has effect against third parties only from the day of its recordation and proof of its execution by the oath of two subscribing witnesses. R. C. C. Art. 2442; 21 Ann. 241, 591; 32 Ann. 927; Act No. 274 of 1855; 21 Ann. 436; 33 Ann. 1248.
7. A certified copy of a private act, even though registered, is insufficient to prove title to real estate—the original must be produced and signatures proved by competent evidence. 26 Ann. 249; 28 Ann. 735.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is a petitory action.

The plaintiff claims to be the owner of certain real estate, advertised to be sold under executory process, issued by Jean Artigues against A. L. Boyer, to foreclose a mortgage.

He avers a purchase of the property by him from Mrs. Lougarre, on December 17, 1885, by act duly recorded on the same day in the conveyance book, and inheritance of the property by his vendor from her father, Eugene Amet, who died in 1875.

He calls in Mrs. Lougarre to make good his title, and the latter appearing, calls in A. L. Boyer to defend her title, by virtue of a clause in a private writing, which is a submission to arbitrators of a litigation once pending in the succession of Amet, in which the property in question was involved, and to which A. L. Boyer was a party.

The plaintiff coupled his demand for recognition as owner, with a prayer for an injunction to arrest the sale, which was granted.

The defense moved to strike out the call in warranty, *because* the law does not authorize such a proceeding by a plaintiff, and *because* the plaintiff averred the mortgage to have been subsequent to his purchase.

The call in warranty was stricken out by the Court.

Boyer vs. Sheriff et al.

For answer, the seizing creditor denied any title in the plaintiff that could prevail over his mortgage and averred that, long prior to the alleged purchase of plaintiff, i. e., May 18, 1878, the property had been sold at the succession sale of Amet to one Bielkiewicz, who had, on the same day, transferred it to A. L. Boyer, and that the two acts had been seasonably and properly recorded.

He further contends that, at the time of execution of the mortgage in his favor by A. L. Boyer, i. e., May 29, 1886, the conveyance books disclosed no alienation of the property by A. L. Boyer to any one.

He concludes, praying for the dissolution of the injunction, with damages.

There was judgment dissolving the injunction—without damages.

The plaintiff appeals and Artigues prays for an amendment of the judgment, by allowing him the damages which he claimed below.

We deem it unnecessary to review the judgment of the lower court striking out the call in warranty made by plaintiff.

Conceding *arguendo*, that the plaintiff had authority to proceed in the manner in which he did and which was objected to, his right to the property in question would not be in the least affected thereby, for it is clear that, whatever his rights may be, if any, against Mrs. Lougarre, and those of the latter against A. L. Boyer, the defendant in injunction and plaintiff in the executory proceeding cannot, in the least, be concluded thereby. Further, it is objectionable to engraft upon the litigation between the plaintiff and Artigues, claims which the former may have against parties who are utter strangers to the latter.

The record clearly shows that, on the 29th of May, 1886, when A. L. Boyer mortgaged the property in question, in favor of Jean Artigues, the public records showed that he had acquired it from Bielkiewicz, on May 18, 1878, who had himself become the adjudicatee thereof at the sale of the succession property of Amet, and did not disclose the fact that he had previous to, or on that day, disposed of his title to it.

It is true that A. L. Boyer, the transferee of Bielkiewicz, was a party to the controversy in which the validity of the adjudication of the property to the latter was involved; that the finding of the arbitrators annulling it and the judgment of the court homologating it were binding upon him; that this occurred in 1883, prior to the conveyance to him by Mrs. Lougarre, and that this sale was recorded in December 1883, more than two years before the mortgage was consented by A. L. Boyer in favor of Artigues; but all this, as far as Artigues was concerned, was perfectly immaterial.

The finding of the arbitrators and the judgment upon it annulling

Boyer vs. Sheriff et als.

the adjudication, divesting A. L. Boyer of any title to the property, had not been recorded previous to the granting of the mortgage. Neither had the sale of the same property by Mrs. Longarre to A. L. Boyer been recorded. To this date neither appears to have been recorded in the regular conveyance book of the proper office.

It is worthy of notice that the act of sale by Mrs. Longarre to the plaintiff of the property contains no derivation of title. It does not state that the property sold belongs to the vendor, Mrs. Longarre, for having been inherited by her from her father, and that it once stood in the name of A. L. Boyer; but that his ostensible title thereto had been judicially annulled and divested. So that, it cannot be pretended that, by an inspection of the conveyance book, a third person could at the time of the mortgage have ascertained from it, the least vestige of a mutation of title.

No third person, under the peremptory provision of the law, can, as a rule, be bound by an alienation of real estate, in or to which he may have some title or claim, unless it appear from the proper public records, that his debtor, whoever he be, has parted with his title or has encumbered his estate; and, even then, only to the extent, if any, expressly prescribed by law. 14 Ann. 414.

A different interpretation of the law would prove destructive of the benefits which it intends to confer, and would place capitalists at the mercy of their debtors and jeopardize loans of money on mortgage security.

We therefore conclude that a money lender may safely deal, as far as the question of ostensible ownership goes, with one whose title to real estate appears on the proper public records, and that he cannot be injuriously affected by any anterior transfer of the property, unless the same be made by the ostensible owner, or by his authorized agent, or by judicial authority, and the transfer has become *patent* by proper registry. No other notice can prove knowledge.

The plaintiff has not proved that the defendant ever had legal and sufficient notice of the transfer of the property to him, by Mrs. Longarre, previous to the date of the mortgage, and Artigues is not bound by the arbitration proceedings which, as to him, are *res inter alios acta*.

The injunction was properly dissolved. As it did not arrest the execution of a money judgment, but simply of an order of seizure and sale, the district judge was right in not allowing damages.

Judgment affirmed.

Lapleine vs. Railroad and Steamship Company.

No. 1307.

BERNARD LAPLEINE VS. MORGAN'S LOUISIANA AND TEXAS RAILROAD
AND STEAMSHIP COMPANY.

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In a suit by the father of a minor child for the latter's separate use and benefit, the mother is not disqualified as a witness, because she does not testify for or against her husband but for or against the child, and the case is not affected by the provision of law giving to fathers and mothers the enjoyment of the estate of their minor children.

When two causes co-operate to produce the damage resulting from a legal injury, the proximate cause is the originating and efficient cause which sets the other cause in motion. The duty of care and of abstaining from the unlawful injury of another applies to the sick, the weak, the infirm, as fully as to the strong and healthy, and when that duty is violated, the measure of damages is the injury done, even though such injury might not have resulted but for the peculiar physical condition of the person injured, or may have been aggravated thereby.

Thus, though the damage done to a child by an injury appears to be aggravated by a latent hereditary hysterical diathesis, which had never exhibited itself before the accident and might never have developed but for it, the party in fault will be held for the entire damage as the direct result of the accident.

A PPEAL from the Twenty-first District Court, Parish of Iberia.
Mouton, J.

R. S. Perry for Plaintiff and Appellee :

A document placed in evidence by defendant, on cross-examination of plaintiff's witness, without restriction, is to be considered as substantive and independent evidence.

Testimony of a witness, otherwise unworthy of belief, is to have full weight, in so far as it is supported by other credible testimony, and particularly when the supporting evidence consists of an affidavit secured from the witness by the party against whom she testifies, and is put in evidence by him.

The negligence of a parent or guardian cannot be imputed to a *non sin generis*, who is not herself in fault, Beach on Contributory Negligence, p. 137.

When a latent disease may or may not develop into activity, without the intervention of some accident, and it is developed by an accident, the predisposition is not, and the accident is the efficient, proximate cause. The efficient cause is that which puts the others in motion. It need not be the sole or immediate cause. Defendant cannot show that plaintiff would have suffered as much had he not wronged. 5 Otto 117; Sherman & Redfield, 310; Sedgwick, vol. 1, page 60; note vii; *Ibid*, vol. ii, p. 362, note 6; Patterson, § 17, 13, 29, p. 26; Thompson, p. 1267, § 61; Sutherland, vol. iii., p. 434, note.

Misconduct of parents after accident cannot affect the rights of their child.

Evidence, admitted under general averments, or no averments at all, is to have full effect. 16 Ann. 273; 20 Ann. 70, 241, 379; Louque, p. 234 (c).

Burden of Proof. The rule is, *ei incumbit probatio qui dicit, non qui negat*. But if subject of negative proposition is specially in knowledge of other party, it will be taken as true, unless that party disproves it. The happening of a catastrophe which might have been prevented raises a presumption of negligence. These circumstances may throw burden of exculpation on defendant. *Res ipsa loquitur*. Greenleaf, § 79; Lawson on Presumptive Evidence, p. 112; Wharton on Evidence, § 367, 359, 360; Moak's Underhill, pp. 310, 313, 315; 11 Wall 130; Am. Law Register (N. S.), 350, 363, note Kirt vs. Millmambule, 46; Wise 489; Thompson on Negligence, p. 1267, note; 3. *Res*

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ipse loquitur, pp. 1228, 1229, 1230; *Day vs. Railway Co.*, 35 Ann. 698; 37 Ann. 777; *Patterson Accident Law*, p. 434, § 375; *Ibid*, § 375.

Jury can consider what it sees in visiting *locus in quo*, and the injured party in connection with testimony of witness.

Damages. Measure of Damages.—Discretion of the Jury, C. C. 1934, 2315, 2316; *Sutherland*, vol. iii, pp. 711, 712 *et seq.*; *Thomson*, pp. 1256, §§ 44, 62, 63; *Sedgwick*, vol. 1 p. 44; *Patterson*, §§ 393, 394, 37 Ann. 93.

In torts a party committing a wrongful act is responsible for all direct injuries resulting from his wrongful act.

It is not necessary that the damages be foreseen, as consequential damages from breach of contract must be contemplated by the parties. *Sutherland*, vol. iii, pp. 714, 20, 47, 48.

Injured persons entitled to prospective damages. *Thompson*, vol. ii, p. 1263, § 47; *Sutherland*, vol. i, pp. 175, 190, 193; vol. iii, pp. 266, 722; *Sedgwick*, vol. 1, p. 208; 17 Ann. 19; 22 Ann. 603; 23 Ann. 180; 35 Ann. 205; 38 Ann. 779.

Assessing damages torts is the peculiar province. *Sutherland*, vol. 1, p. 810; vol. iii, p. 730; 10 Ann. 88; C. C. 1935, § 3; 13 Ann. 26; 19 Ann. 362; *H.*, p. 106 (g) No. 2; 12 R. 678; 37 Ann. 93.

A document from which witness has refreshed his memory, and to the truth and correctness of which he has sworn, is admissible in evidence if not *per se*, inadmissible. It is admissible as independent evidence. *Wharten on Evidence*, § 516.

An expert cannot testify as to his opinion before he has testified to the facts. It is only after he has testified to the facts that he may state his opinion. *Rogers on Expert Testimony* p. 48, § 31.

A non-expert witness may sometimes state opinions, or conclusions such as to whether a person is intoxicated, or sober; or sad, or suffering and looked bad, or eccentric, etc. *Rogers*, § 3.

The report of experts cannot be considered unless they have been appointed and sworn, and have proceeded and have made their report, and same has been homologated pursuant to C. P. 142, 446, 448, 450, 451, 453, 454, 456.

Excessive Damage.—17 Ann. 19; 23 Ann. 180; 37 Ann. 705; 38 Ann. 778.

D. Offery for Defendant and Appellant:

1. Plaintiff, in action of damage, must show the act creating the damage. When that fails, no recovery can be had. C. C.
 2. Where damages are asked for a result, wholly unexpected and unnatural as a consequence of the act complained of, no recovery can be had.
 3. The resultant damage must be connected with the act, as proximate and efficient cause, by necessary concatenation.
- Sutherland on Damage*, pp. 20 to 25; *Sedgwick*, 112 to 114; *Beach Contributory Negligence*, 32; *Scheffer vs. R. R. Co.* 105 U. S. R. 248; 4 Col. Rep. p. 347.

The opinion of the Court was delivered by

FENNER, J. The plaintiff sues in behalf of his minor child, Marie Lapleigne, to recover damages for injury inflicted upon her through the fault of the defendant company.

He alleges that in April, 1885, Marie, with other children, was at play in the rear part of her father's yard, on the inside of a plank fence separating said yard from the railroad track of said defendant, when a train of cars belonging to the latter and loaded with split lumber passed along said track, and the stakes confining said lum-

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ber becoming loosed or disarranged, the lumber broke away from its fastenings and tumbled off the car, part of it being precipitated over the fence and falling into plaintiff's yard, striking the child, Marie, and inflicting on her the injuries complained of.

The evidence is, to our minds, conclusive on the following points, viz:

1. That the lumber was precipitated from defendant's car over plaintiff's fence and into his yard substantially in the manner charged.

2. That this was caused by the improper loading or insufficient fastening of the lumber and by the imprudent handling of the train, and is imputable exclusively to the negligence and fault of defendant.

3. That the child, Marie, was struck and injured by the falling lumber.

4. That the child was entirely free from any fault or contributory negligence of any kind whatever.

As to all the above points, except the *third*, there is no room for the slightest dispute.

As to the third point, the evidence is conflicting, but after a thorough scrutiny, we are perfectly satisfied that Marie was struck and injured by the lumber.

The child was undoubtedly in the yard and near where the lumber fell. The lumber was pitched over into that yard. Immediately afterward the child was found with a wound upon her head and bruises on her body, and she stated she had been hurt by the falling lumber, although, by reason of her age and condition, she was not admitted as a witness.

The colored nurse, Mary Coleman, was the only immediate witness of the injury to the child. She is a curious example of utter depravity and insensibility to the obligation of truthfulness. She pretends to have been bribed by both parties, and her only complaint was that neither had paid the promised bribe. She was put on the stand by plaintiff and testified on every point in her favor. The counsel for defendant then produced a written statement made by her before a notary, and under oath, some time before, in which she contradicted nearly everything she had just been saying. Of course, such a witness is unworthy of belief; but it is a significant fact, that in the statement above referred to, which had been obtained from her by the agents of defendant and was produced by it on the trial, she stated positively that Marie was struck and hurt by the lumber. On this point we believe she told the truth. She is confirmed by Mrs. Laplane, the mother of Marie, who saw the child when she was withdrawn

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from the lumber that had fallen upon her. Her testimony was objected to on the ground that she was incompetent under the provisions of Art. 2281, Rev. C. C., which declares that "a husband cannot be a witness for or against his wife, nor a wife for or against her husband."

It is clear that this is not the husband's suit, but that of the child. The petitioner himself expressly declares that he sues "in his capacity as father to his minor child, Marie, and for her separate use, benefit and advantage." The circumstance that, under Art. 221, C. C., "Fathers and mothers shall have, during marriage, the enjoyment of the estate of their children until their majority or emancipation," subject to the obligation of supporting and educating them, is not sufficient to disqualify either of them as witnesses in cases in which their children are parties. If it would disqualify either, it would disqualify both, since the law gives the enjoyment to "fathers and mothers."

There is much other corroborating and confirmatory testimony, and the whole, taken together, completely overwhelms the efforts of one or two employees of the railroad to establish that Marie was not struck by the lumber, but was some distance from where it fell, and was hurt by tripping and falling as she ran away in alarm. Not only is this theory inconsistent with all the facts and other testimony, but it is utterly insufficient to account for even the apparent physical injuries which Marie undoubtedly received.

The foregoing points being thus settled, it conclusively follows that the defendant is responsible for the damage legally occasioned by its negligent fault.

As to the nature and extent of the injury, it is shown, without any semblance of contradiction, that up to the moment of this accident Marie, then eight years old, had been a bright, intelligent, active and thoroughly healthy child. From that moment she became, and has remained, a constant invalid, seriously affected in mind and body, her nervous system shattered, subject to headaches, to attacks of nausea and vomiting, to frequent and sudden fainting or falling fits, emaciated, indisposed to physical or mental exertion, dragging her limbs in walking, and otherwise afflicted. At the time of this trial about two years had elapsed since the accident, and, though slightly improved, the child continues, to a great extent, affected, as above indicated.

The medical testimony indicates that it is doubtful when or whether ever she will entirely recover. If the foregoing injury and suffering have been occasioned by the accident as the legal, proximate cause,

it would be difficult to say that the verdict of the jury for \$7500 was excessive. But defendant maintains that the physical injuries directly inflicted upon the child were slight and unimportant and utterly inadequate of themselves to produce the disastrous results which have been manifested; that these results have been occasioned by the peculiar constitution of the child, who inherited from its mother a hysterical tendency or diathesis, the development of which has intervened as the operative and efficient cause of her affliction and sufferings, and that the accident is not, therefore, the true *causa causans*, the proximate and efficient cause casting responsibility on defendants.

We are by no means satisfied that the external manifestations indicate conclusively the extent and nature of the injuries received, or that the shock and derangement of the nervous centres and spinal cord may not have been sufficient to produce like results in an ordinarily constituted child.

It is, however, proved that the mother of the child is subject to hysteria; that hysteria is, in many cases, heritable, and that the symptoms of the child's affliction are, in many respects, of a hysterical character.

But it is very certain that the child had never exhibited the slightest symptoms of hysteria or other constitutional disease prior to this accident; the medical testimony does not establish that hysteria is necessarily or universally inherited, and it does not appear that, but for this accident, Marie might not have passed her entire life without the slightest development of hysteria.

Admitting, therefore, that the child had a latent hysterical diathesis, in order to escape liability it would devolve on defendant to show that such diathesis was by itself a sufficient independent cause which would have operated in producing or aggravating the damage independently of the accident.

In this defendant has entirely failed.

If the hysterical diathesis concurred with the accident in producing the damage, in determining which of the two is the proximate cause, we must inquire which was the cause that set the other cause in motion.

In the language of the Supreme Court of the United States, "the proximate cause is the efficient cause, the one that necessarily sets the other causes in motion." *Ins. Co. vs. Boon*, 95 U. S. 117.

We are cited to a Colorado case which holds that where the physical condition of the person injured is, at the time of the injury, such that the

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injuries caused by the negligence are thereby aggravated, the railway is not liable for that aggravation. *P. P. C. Co. vs. Barker*, 4 Col. 344.

We think, however, the doctrine is not sound and is not in accord with the weight of authority. The duty of care and of abstaining from injuring another is due to the weak, the sick, the infirm, equally with the healthy and strong, and when that duty is violated the measure of damage is the injury inflicted, even though that injury might have been aggravated, or might not have happened at all, but for the peculiar physical condition of the person injured.

Thus, in one case, a person afflicted with scrofulous disease was injured by the negligence of a municipal corporation in failing to keep its streets in repair, and suffered damage greatly in excess of what he would have suffered but for his disease; yet the court held that the corporation was bound to keep its streets in repair for the sick and infirm as well as for the well, and held the city liable for the whole damage. *Stewart vs. Ripon*, 38 Wis. 584.

In another case a pregnant woman was injured, resulting in malformation of the child carried and its subsequent delivery, dead; and the author of the negligence was held liable for the whole damage. *Shartle vs. Minneapolis*, 17 Min. 301, *lo.*

A railway was held liable for cancer following at an interval of three weeks after a blow on the breast of a female. *B. C. P. Railway vs. Kemp*, 61 Md. 74; (see also) *Ry. vs. Buck*, 96 Ind. 346; *Jucker vs. R. R.*, 52 Wis. 150; *Delic vs. R. R.*, 51 *id.* 400; *Sauter vs. R. R.*, 66 N. Y. 50; *Beauchamp vs. Mining Co.*, 50 Mich. 163; *Barbee vs. Reese*, 60 Miss. 906; *Patterson's Ry. Acc. Law*, §§ 29, 278; 2 *Thomp. Neg.* 1099.

The inheritance of a hysterical diathesis (if it existed) was a misfortune, but certainly not a fault, in this child; it in no manner diminished her right to protection from injury by the fault of defendant; prior to this accident she had never suffered from this latent constitutional taint; but for the accident, she might never have suffered from it; the accident was the direct, immediate and efficient cause which set in motion all other causes which created or aggravated the damage; and the defendant is justly bound to answer for these deplorable consequences of his fault. There is evidence, however, showing that the child's affliction and injury have been aggravated by the injudicious conduct and treatment of her mother. For such aggravation of the damage suffered, it goes without saying that defendant cannot be held liable. We need not particularize as to the nature of this conduct, except to say that it does not reflect upon her sincerity, but only

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on her injudicious sympathy and encouragement and excitement of the child's disordered nervous system.

This and some other considerations lead us to reduce the damages allowed by the jury.

It is, therefore, ordered and decreed that the verdict and judgment appealed from be amended by reducing the principal thereof to \$5000 and that, as thus amended, it be affirmed, appellee to pay cost of appeal.

Judgment amended.

 No. 1310.

P. G. GIBERT VS. DAVID SIESS.

When a planter executes his notes, and discounts them with his factor, who places their proceeds to his credit on account, the same may be sued upon *via ordinaria* by the latter, the right being reserved the former to prove a want or failure of consideration therefor.

A PPEAL from the Twelfth District Court, Parish of Avoyelles, Overton, J.

J. O. Cappel and David Todd for Plaintiff and Appellee.

Wm. Voorhies and Thorpe & Peterman for Defendant and Appellant:

1. As between the parties to a contract, suit cannot be brought on the accessory, ignoring the existence of the principal obligation. *Ward vs. Douglas*, 22 Ann. 463.
 2. When mortgage notes are given by planter to commission merchant exclusively to secure future advances in account current, the latter cannot foreclose on the mortgage notes without reference to the account current, he must sue for settlement and liquidation of account current, and simultaneously foreclose on the mortgage notes for the balance, which may be struck in his favor. Beyond this he has no rights. *Durrie vs. Key*; *Lanata vs. Bayhi*, 31 Ann. 229; 7 Ann. 298.
 3. For facts see statement in brief as to principal eventual obligation of which the mortgage notes were accessory. 20 Ann. 154, C. C. Arts. 3292, (3259) 3293, (3260) 10 Rob. 383; 2 Ann. 971; 5 Ann. 231; 7 Ann. 298; 18 Ann. 235; see also 4 L. 268; 8 L. 276, 531; 16 L. 374; 9 Rob. 482; 12 Ann. 529; 15 Ann. 646; 16 Ann. 437; 21 Ann. 668; 24 Ann. 36; 28 Ann. 357; 30 Ann. 84, 868; 34 Ann. 352.
- The exception that petition discloses no cause of action is fatal to plaintiff's suit. The evidence elicited on the merits, shows the propriety of remitting him to the proper proceedings in order to determine the rights of the parties advisedly. See *Nix vs. His Creditors*, 2 South Rept. 391.

The opinion of the Court was delivered by

WATKINS, J. Suit *via ordinaria* is brought upon two promissory notes secured by mortgage. They were executed by the defendant as collateral security for his account with the plaintiff as his commission merchant.

To the petition defendant tendered an exception of no cause of ac-

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tion, and, it having been overruled, he filed an answer in which he pleaded the general issue, the discharge of the debt evidenced by the notes and mortgage, and a demand in reconvention for the sum of \$1500. On the trial the judge *a quo* gave the plaintiff judgment for \$3400, but rejected his demand for the recognition of his mortgage, and allowed the defendant \$715 37½ on his reconventional demand. There is, also, a stipulation in the decree to the effect that it shall not become executory until certain notes, other than those sued on are canceled and returned to the defendant.

From this judgment the defendant has appealed.

For relief at our hands his sole reliance is placed on his exception, which he insists was improperly overruled.

His insistence is that, if he owes anything to the plaintiff, it is only a balance of account, and not on the notes.

That this balance is represented by the notes sued on as collateral security. That he has no cause of action on the notes, or for the foreclosure of the mortgage securing their payment, but is restricted to suit "for a liquidation and settlement of accounts."

This objection is technical.

In addition, this defense has served defendant every purpose he could have expected. For, on the trial the plaintiff did not rest his case on the introduction of the notes and mortgage in evidence, but he offered his own depositions--twice taken--with all of defendant's accounts, from the commencement of his transactions in 1880, to their termination on the 10th of March, 1885, showing a debit balance of \$3,794 15.

The defendant was not restricted in the introduction of evidence in his favor. He produced and filed plaintiff's account against him for 1883-4. He was examined as a witness in his own behalf, and upon his evidence the reduction of the plaintiff's demand was secured, and the allowance was made on his reconventional demand.

We do not understand that any complaint is made of the correctness of the judgment appealed from, in any essential particular.

This case comes fairly within the principle announced in *John Chaffe & Sons vs. Whitfield*, recently decided at Monroe, in which we held that a mortgage note furnished by a planter as collateral security for advances to be made by his commission merchant for the working of a plantation, may be sued directly by the holder for the exact amount of the advances; and that, in the absence of proof of a want of consideration, and in presence of evidence, showing that the advances have been made, payment of the note may be enforced.

Such was the view entertained by our immediate predecessors in *Lanatta vs. Bayhi*. 31 Ann. 229.

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Such a note not only secures the debt on open account, but liquidates it, and enables the factor to place it with his creditors or bankers. *Mix vs. Creditors*. 39 Ann. 628; *Pickirsgill vs. Brown*. 7 Ann. 307; *Morris vs. Cain*. 39 Ann. 730.

In this instance the defendant's notes were discounted and the proceeds placed to his credit. Same were disbursed for his account, and at the close of the season nothing remained to his credit, and there was nothing applicable to the credit of the notes at their maturity, except the amount for which credit was given in the judgment. *Lehman, Abraham & Co. vs. Godbury*, 40 Ann. 219.

There appears to be nothing to be adjusted on open account. It was balanced and closed, and the only sum that is due to the plaintiff is that remaining due on the defendant's discounted paper.

Had the proof disclosed a further sum unexpended by the defendant he would have been entitled to credit therefor, likewise.

This case is easily distinguished from an ordinary suit upon a promissory note and mortgage, against which unliquidated demands cannot be urged in compensation. We think defendant has had the fullest opportunity of showing the want or failure of consideration of the notes, and that is all that justice and equity entitle him to demand.

Judgment affirmed.

No. 1306.

THE STATE OF LOUISIANA VS. CYRIAQUE WASHINGTON AND CLEOPHILE BROWN.

When a party is indicted and notice of the *venire* list is served on him, and the indictment is afterward *nolle prossed* and an information is filed against the accused at the same term of court charging the same offense, it is not necessary to again serve a copy of the *venire* on the accused.

When the accused has made several distinct confessions at different times, the State cannot be required to prove that the first confession was obtained without threats, violence or undue influence, before interrogating the witnesses as to other confessions.

The State cannot be controlled in the order of introducing these confessions in evidence.

APPEAL from the Twelfth District Court, Parish of Avoyelles.
Coco, J.

J. N. Ogden, District Attorney, and *James Andrew*, District Attorney, for the State, Appellee.

L. J. Ducote and *J. H. Ducote*, for Defendant and Appellants.

The opinion of the Court was delivered by

McENERY, J. The accused were indicted by the grand jury of the

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parish of Avoyelles, under Sec. 851, Revised Statutes, and were charged with burglary, with intent to commit rape.

The accused were arraigned on said indictment, and the trial fixed for the 14th of June, 1888. A copy of the indictment was served on them, and on the 7th day of June a list of the venire for that term of court. The district attorney, discovering some flaw in the indictment, filed an information against the accused under the same statute, and charging the same offense. A copy of this information was served on the defendants on the same day it was filed, the 13th day of June. The case was called for trial on the 14th day of June, and the district attorney dismissed the prosecution under the indictment. The case was fixed for trial on the 16th day of June.

The accused complain that they were entitled to the jury list two days before their trial. The jury list was served on them, as appears by the sheriff's return, on the 7th day of June. It was not necessary to again serve a copy of the venire on the filing of the information. The information was filed at the same term of court, for the same offense, and they had notice of the jury list duly served, which had been summoned for that term of court.

The law was fully complied with. The accused had notice two whole days, before they were tried, of the jury that was to pass upon their case.

There were several confessions made by the accused. The accused objected, on the trial, to the interrogations of the witnesses upon the several confessions, without the State first showing that the first confession had been proven and had been made without force, violence or threats. The first confession may have been obtained by improper means while the others may have been made voluntarily. There is nothing to show but that all the confessions were voluntary. It was a matter in the discretion of the district attorney as to the manner in which he should introduce the evidence and as to which confession he should use as evidence on the trial.

There is no force in the objections made by defendants. The accused, it appears from the record, had a fair and impartial trial, and there were no errors on the trial shown by the bills of exceptions.

Judgment affirmed.

Succession of Guidry.

No. 1314.

SUCCESSION OF MARCELITE GUIDRY.

The law does not require that proceedings be instituted to remove an executor who has failed to furnish security, when ordered to do so, under the provisions of Article R C. C. 1766. The law is self-operative.

The failure to furnish the security within the delay fixed, *ipso facto* removes the delinquent.

A vacancy is thereby created instantly, which can be filled, after due notice, by the appointment of a dative executor.

A child who has furnished alimony and thus maintained an ascendant in need is not entitled to recover the value thereof from the latter's insolvent succession. Having paid a debt, he cannot claim to be a creditor. A transfer of his claim conveys no right which he did not possess.

A PPEAL from the Thirteenth District Court, Parish of St. Landry.
Lewis, J.

Henry L. Garland for Opponent and Appellant.

Laurent Dupré and *T. L. Tansey*, *contra*.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The account presented by Laurent Dupré, as dative executor of the deceased, is opposed by Lastie Dupré, a mortgage creditor for upwards of \$2000.

The opponent charges that Laurent Dupré is not the dative executor of the deceased, because his appointment is unwarranted and null, for the reason that the executor appointed by the deceased was never regularly removed from the trust by any judgment of court, and that, therefore, Laurent Dupré has no capacity to represent the succession.

He further charges, that the sum of \$1440 allowed in the account to Mrs. Alcée Dupré, for board, lodging, nursing, etc., to the deceased, during two years, including her last illness, is not due.

He, besides, opposes other items which do not appear to be seriously contested.

The district court maintained the validity of Laurent Dupré's appointment, allowed half of the sum to Mrs. Dupré, part with privilege on the proceeds of the real estate sold, and part as an ordinary claim.

It also passed upon the other items.

The opponent, having died, his executor appeals from this judgment, and Mrs. Dupré asks that it be amended, so as to allow her the entirety of the claim in her favor, on the account.

So that there are only two questions involved: *first*, the validity of Laurent Dupré's appointment; *second*, the reality of Mrs. Alcée Dupré's claim and the security allowed for payment.

I.

It might suffice to say that the opponent cannot be heard to attack the appointment of the dative executor, not only because he does so collaterally, but also because he lays no claim himself to the trust; but it may be preferable to determine the question at issue.

It appears that Mrs. Guidry had appointed Alc  e Dupr   as the executor of her will, dispensing him from giving security, and that he was confirmed and qualified as such; that Lastie Dupr  , the present opponent, availing himself of the privilege accorded by Article R. C. C. 1677, obtained a peremptory order which was duly served, requiring the executor to furnish security, within thirty days after notice in the sum of \$2780, exceeding by one-fourth the amount of his claim; that the delay allowed expired without such security being furnished; that thereupon, Laurent Dupr   petitioned for letters of dative testamentary executorship and his application was ordered to be published; that, at the end of the time fixed for opposition, none having been filed, he was appointed, took the oath and furnished the bond required by law.

The contention is, that before this application could have been filed and the appointment conferred, it was an essential condition precedent, *sine qua non*, that Alc  e Dupr  , the regular executor, should have been proceeded against, in a direct action and if the circumstances justified, he could then be removed.

In support of this position, counsel refer to a number of authorities, the correctness of which cannot be disputed; but which have no application to the present matter, for the reason, that the issue now presented is raised on a state of facts, controlled by a law which was not in existence when those cases were decided and which has served as a guide for the proceedings in the instant case.

Indeed, the article referred to, 1677 R. C. C., is the result of an amendment of Article 1670 of the code of 1825, made by the legislature of 1868, (p. 117).

It justifies the proceedings instituted by Laurent Dupr  , from beginning to end.

It declares, in as emphatic language as could be used, that should the executor, who has been ordered to furnish security, fail to do so within the delay allowed, the failure shall, *ipso facto*, work an immediate removal and the judge shall appoint a dative executor.

The legislature possessed the power of enacting such a remedial law. It has done so, making it self-operative.

To contend otherwise, is to hold that the law means "*shall not ipso*

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facto," when it says, "*shall ipso facto*;" in other words, to make it say the reverse of what it does.

No proceeding was therefore necessary to remove Alcée Dupré. The moment that the delay allowed expired, after notice, without his giving the demanded security, he ceased to be the executor of the deceased and a vacancy was created, which could be and was filled.

II.

The next matter to be considered is the item of \$1440, in favor of Mrs. Alcée Dupré, recognized by the dative executor, for expenses of last illness.

It is contended that the claim, if it ever existed, belonged to Alcée Dupré, that it could not have been enforced by him, in as much as it was for alimony furnished by him to his necessitous mother, the deceased; that, if it could be urged, it formed part of the community property between him and his wife; that the claim cannot be recovered by the latter, but by the former only; that the *dation en paiement* which he made to her of it, since his mother's death, has not validated it, any more than if it had not passed from him to her, and that it is not entitled to a privilege.

There can be no doubt that Mrs. Guidry being in penurious circumstances, her son was bound in law and in conscience, to provide for her, as well in health as in sickness; for it is written, that children are bound to maintain their father and mother and other ascendants who are in need. R. C. C. 229; N. C. 205.

The French text of Art. 229 of the R. C. C., as found in the Code of 1825, and which is taken from Article 205 of the Napoleon Code, reads:

"Les enfans *doivent* des alimens à leur père et mère et autres ascendant qui sont dans le besoin;" literally meaning:

"Children *owe* alimony to their father and mother and other ascendants who are in need."

The word "*doivent*" (owe) implies a *debt* imposed upon them by law in that respect, for the satisfaction of which a civil action lies. (R. C. C. 233.)

The fulfillment of that obligation does not transform the child into a creditor, capable of claiming reimbursement in any contingency. He has paid a *debt* imposed upon him by law, and simply remains in the condition of a debtor who has discharged an obligation.

The case would be different if, instead of being the only child, the son had had brothers or sisters, for in that case, as each and all would have been bound to provide entirely, as it were *in solido*, for the wants and

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Succession of Guidry.

necessities of the mother, the child performing his obligation could have had recourse *against the other issue* for contribution.

He could, had the mother died solvent, have made good his claim against their share in the succession, but such is not the case here.

Mrs. Guidry has died insolvent, leaving property burdened for much more than it realized, and which is the common pledge of her creditors.

To cast upon that estate the charge in question, would be to shift the burden of alimony from the shoulders of the children, to that of the creditors.

Had a stranger provided for Mrs. Guidry as her son has done, he would surely have had the right of claiming payment, for the obvious reason that the law has not made it his *duty* to maintain the needy, and recognizes in him, where he has not done so in a spirit of liberality, the right of repeating, even with a privilege, for a certain period, the amount of his disbursements.

After an elaborate discussion on the subject now under consideration, Marcadé, concludes that the *duty* of maintaining the needy ascendants is a *debt* imposed by law on the descendants. Vol. 1, p. 534, No. 709 *et seq.*

Baudry-Lacantinerie, an eminent professor, says that those obligations are dictated by the law of nature. The father has given life to the son and the latter must assist him in preserving his own, if his means are sufficient. This author looks upon the obligation as a sort of restitution. "*Parentibus alimenta non praeestatis, sed redditis. Iniquissimum enim quis dixerit patrem egere, quum filius ejus abundaverit.*" Vol. 1, p. 339, No. 589.

Laurent, in his admirable commentaries on the French Code, propounds the question, whether he who has supplied alimony can claim payment for the same, and says that the solution involves serious difficulty.

He does not, however, hesitate to state that a first point is certain, namely: that, according to general principles, there exists no room for repetition. He who has furnished the alimony has paid what he owed, for, alimony is a *debt*. Therefore he to whom it has been furnished has received what was due him. Repetition could be admitted only where one, believing himself bound, was not really so, and has in error supplied the alimony. In such a case the principle of claiming what was unduly paid would control. Vol. 3, p. 107, No. 79.

Fuzier-Herman, who edits with surprising ability a new edition now being published, of the French Code, to which are appended notes and references which exhibit great researches and exactness, an-

Succession of Guidry.

nounces, that the care and assistance furnished by a son to his father in need can be viewed only as the fulfillment of a filial duty, and cannot create in favor of the son a claim against the succession of the father. Hence, if the father by his will has acknowledged himself a debtor to his son, because the latter had supplied his wants, this disposition will be considered as constituting a liberality.

Reference is made to a decision of the Court of Rennes, 9 November, 1878, and to Aubry & Rau, t. 6, p. 73, section 547, note 3.

See Code Civil, annoté par Fuzier Herman, Art. 205, p. 283, section 3. *Repetition des aliments.*, Nos. 64 and 65.

Those authorities settle the question beyond cavil.

It will not avail, in the instant case, to say that Mrs. Dupré is a creditor, while her husband may not have been one.

She holds by a *dation en paiement* from him, and has acquired no greater right than he himself possessed. As he could not have claimed, she cannot do so in his place.

She is not separated in property.

Admitting that she attended exclusively to Mrs. Guidry and could have claimed remuneration, any earning and payment would have fallen into the community, and compensation, if due, would have been asserted by the husband, as head and master. But it has been said that he had no claim to urge for the alimony supplied.

The item of \$1440 placed on the account, should have been stricken out entirely as not due either to Alcée Dupré or to his wife, and the creditors of the deceased must be relieved from the burden of the same.

We do not consider that we are called upon to pass upon the correctness of the judgment of the lower court, reducing certain small items placed on the account, and which were opposed, as we hear of no complaint from either side.

It is, therefore, ordered and decreed that the judgment appealed from be reversed so far as it allows Mrs. Dupré part of the item of \$1440 figuring in her favor on the account, and that said amount be stricken entirely from said account as not due by the succession.

It is further ordered and decreed that in other respects said judgment be affirmed, the costs to be paid equally by appellant and appellee.

Thompson vs. Walker, Executor.

No. 1309.

DAVID B. THOMPSON VS. G. C. WALKER, TESTAMENTARY EXECUTOR.

Where only a partial settlement of a partnership has been effected and where certain matters have been expressly reserved for future settlement and adjustment, an action will properly lie for a further and complete settlement.

A PPEAL from the Nineteenth District Court, Parish of St. Mary.
Allen, J.

Breaux & RenouDET for Plaintiff and Appellee.

D. Caffery for Defendant and Appellant.

The opinion of the Court was delivered by

FENNER, J. This case was before us at our last term at this place, upon exceptions filed by the defendant and maintained by the lower court. We then reversed the judgment, overruled the exceptions and remanded the case to be tried on the merits. *Thompson vs. Walker*, 39 Ann. 892.

As stated in that opinion, the action is for a settlement of a partnership between the parties. One of the exceptions was that the partnership had been finally settled. We stated that this exception properly belonged to the merits.

The defendant now answers setting up again that the partnership has been fully settled, by a notarial act, and that the only matters outstanding and which it is the object of the present action to recover, are individual personal claims by plaintiff against defendant, which cannot be enforced under the guise of an action for settlement and against which he pleads prescription.

As indicated in our former opinion, the notarial act referred to is not, and does not purport to be, a final settlement, but only a partial one. The matters touching which the present controversy arises, were expressly exempted by the following language, viz: that they "are hereby specially reserved in this settlement and are to be finally adjusted, settled and concluded by referring the same to arbitrators," etc. The arbitrators have never been appointed or called for by either party, and no offer or demand for arbitration is now made. Plaintiff's right to sue for a completed settlement of the partnership so as to embrace these matters cannot, therefore, admit of question.

They are matters arising out of the partnership relations and recognized by both parties, in the notarial act referred to, as properly

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involved in the partnership settlement, and defendant cannot now be heard to deny it.

The evidence leaves no doubt as to the correctness and justice of plaintiff's claims, and the only object of this technical defense seems to be to subject them to a shorter prescription. They consist of funds retained by Walker, as liquidator of the partnership, out of the share coming to Thompson, under pretense of certain rights claimed by Walker which are the subjects of dispute and were reserved, as stated above, in the settlement. The effect of the judgment now rendered, is to settle this dispute, to complete the settlement and to award to Thompson his share of the partnership funds which had been retained by Walker, as liquidator.

Judgment affirmed.

No. 1313.

CLEONISE SAVOIE ET AL. VS. JULIUS MEYERS ET AL.

In case the vendor really and seriously contemplates and agrees to sell a tract of land at a price which is fixed and certain, and the vendor, while offering and proposing to buy the land, obtained also a transfer of a judgment upon the false assertion that it operates as a judicial mortgage on the land sold and in respect to which the vendor is really deceived, *held* that on appropriate allegations and proof, the transfer of the judgment may be annulled, and the amount that has been realized thereon, recovered of the vendee.

A PPEAL from the Thirteenth District Court, Parish of St. Landry.
Basilio. J. ad hoc.

W. S. Frazee for Plaintiffs and Appellants.

Thos. H. Lewis and Laurent Dupre, for Defendants and Appellees.

The opinion of the Court was delivered by

WATKINS, J. On the 12th of November, 1885, Cleonise Savoie, the widow of Zenon Broussard, acting through Louis Stelly as her agent, conveyed by authentic title to the defendants a tract of twenty arpents of land, and a certain judgment, entitled Zenon Broussard vs. Alcée Dupré, administrator of the estate of Cyprien Dupré, deceased, for the aggregate amount of \$6000.

The price stated in the act is \$500.

The plaintiffs in this suit are the widow and heirs of Zenon Broussard, and it has for its object the annulment and revocation of the transfer of the judgment and the recovery of the amount that has been realized by the defendants under it.

The principal averments made by the widow, Cleonise Savoie, are

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substantially as follows, viz: That, really and in fact, there was no sale contemplated or made of the judgment, and that no price was paid therefor. That, previous to the execution of the act of sale, she and her agent were, by the representations of the defendants, induced to believe that there was a defect in the title to the twenty arpents of land which they proposed to buy, and that this defect consisted in a judicial mortgage resulting from the aforesaid judgment, and which had not been cancelled.

That the defendants proposed to buy the land of her for the price of \$500, but they required that the judgment should be transferred to them also, in order to cure the defect of title. That they caused their lawyer to make an abstract of title, showing that this judgment had not been cancelled, and sent it to her. That the \$500 was paid and received as the price of the land exclusively. That, at the time, she was near eighty years of age and necessitated to transact all of her business through an agent, and that the one she employed was a country gentleman unskilled in legal proceedings. That she and her agent subsequently discovered that they had been deceived and led into error with regard to said judgment operating as a mortgage on the land, and that the title was perfectly clear and unincumbered; but that the defendants were well aware at the time that their representations were untrue, and that same were made for the purpose of fraudulently obtaining a transfer of the judgment; and that they procured and caused the power of attorney and act of sale to be prepared in furtherance of that end.

She represents that said judgment was obtained in 1867, and had been *once revived*, and that same had been in the hands of two different attorneys without anything having been realized. That at the date of the transactions herein recapitulated, no property of the estate of Cyrien Dupré appeared on the inventory, out of which the judgment could have been realized; that neither she nor her agent knew of any; and the defendants were fully apprised of their ignorance of *such* property, and availed themselves of it to procure the transfer of the judgment.

She avers that this judgment was a community asset and owned jointly by her deceased husband and herself, and that at his death the children of the marriage inherited his share thereof, and that the only reason she transferred their interest, as well as her own, was that she regarded it as of no value. That soon after the defendants obtained the transfer of it, they procured an order for the sale of more than fifteen hundred acres of land in the parish of St. Landry, and about eighteen

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hundred acres in the parish of Lafayette, as the property of the estate of Cyprien Dupré, and caused the same to be sold for near \$12,000, of which they were the beneficiaries. That, at the time of the transfer, the defendants well knew of the existence of these large and valuable tracts of land, and withheld the information from her and her agent with the fraudulent purpose of getting possession of the judgment, and of realizing on it; and that they are liable *in solido* to plaintiffs, and should be condemned to pay them the sum realized, to the amount of said judgment, and interest from judicial demand.

She specially avers that the transfer of the judgment was made in error on her part, and consummated in *fraud*, and without consideration on the part of the defendants; and that, in respect to the interest of the heirs, it was otherwise a nullity, having been the sale or assignment of the property of another.

Under proper averments the heirs join their mother and allege the nullity of the sale of their interest, and specially charge fraud and deception on the part of the defendants in procuring the transfer.

They join their mother in a prayer for the annulment of the transfer of the judgment, and for the recovery of the proceeds realized under it.

Ophelia Broussard admits her signature to the power of attorney and unites with her mother in all of her allegations. There is no demand for the revocation of the sale of the land.

In limine, the defendants tendered as exceptions the pleas of no cause of action and want of tender to them of the amount of the purchase price.

These having been overruled, for answer defendants aver that their purchase of the land and the judgment was *bona fide* and for a sound price. They deny any and all allegations of fraud and error, and aver that this suit was brought for the purpose of regaining what plaintiffs had lost by a bad trade.

They further aver that, at the time of this said purchase, they had no knowledge of the existence of the lands which were subsequently sold; that same had never been inventoried in the succession of Cyprien Dupré, nor had they been assessed for taxes; but that same had been ferreted out by skilled land-experts they had employed. They charge knowledge of, and acquiescence in, said sale by the heirs of Zenon Broussard, and plead same as an estoppel against them.

In the alternative they set up a demand in reconvention for moneys disbursed in attorneys' fees and other expenses incurred in searching for and procuring the sale of property of the succession of Cyprien

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Dupré, the proceeds of which was applied to the satisfaction of the transferred judgment, and aggregating in amount \$2711 35, and they annex a bill of particulars to their amended answer, and pray for a judgment *in solido* against the plaintiffs therefor.

On the trial of these issues there was a verdict and judgment for the defendants, and the plaintiffs have appealed.

I.

It is perfectly obvious from the foregoing statement, that the defendants' exceptions were properly overruled. The suit does not seek to set aside the sale of the land. It remains intact. Plaintiffs' contention is that Cleonise Savoie never made a *sale* of the judgment, but merely transferred it to the defendants as the purchasers of the land, and at their suggestion and request, and in order to free the land of a supposed judicial mortgage. On this theory there was nothing due to the defendants, and no tender to be made. The sale *vel non* of the judgment is the *very* question we are to decide; and for us to say that their suit must be abated because of plaintiffs' failure to make a previous tender of the *purchase* price of its sale, would be to anticipate our own decree. Besides, there is an element of such uncertainty in the matter as to remove this from the *class* of cases in which a tender could have been successfully made.

The fact that the mother of the heirs, who made the transfer of their share in the judgment, is one of the plaintiffs in this suit, cannot affect their rights, nor can we perceive any valid objection to their being united in one suit.

They have each a common object in view. Their interests are the same. The mother makes a judicial confession of the nullity of the transfer of the judgment, and upon that score there is nothing further to adjudge. The sole remaining question is whether the transfer of the judgment was and is a nullity in respect to the defendants as the transferees.

II

The salient facts of this case, which are necessary to be detailed, are substantially as follows, viz:

In Oct. 1885, Miss Ophelia Broussard received from A. Levy, managing partner of the firm of J. Meyers & Co. the following letter:

Miss Ophelia Broussard, Carancro, La.

Miss—Our mutual friend, Mr. Joseph Bloch, informs me that you are the owner of a piece of land on the west side of Opelousas. Please advise me at your early convenience whether it is for sale; if so, what is the lowest cash price. Awaiting your early reply, I remain, with regards,

Yours truly,

ALPHONSE LEVY.

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The defendants were informed that the land was for sale, and the cash price was \$509. Defendants agreed to give \$500 for the land, provided the title was good, stating that they would have their lawyer to examine the chain of title and send Mr. Stelly, the agent, an abstract of it. Within a few days the defendant, Levy, wrote Mr. Stelly the following letter, and inclosed the abstract of title therein, viz:

OPELOUSAS, LA., Oct. 21, 1885.

Mr. Stelly, Carancro, La.:

Dear Sir—My delay in answering was caused by *our* attorney making out abstract of title, copy of which I herewith enclose:

The judgment has never been cancelled, and as the original holder is now dead, the mortgage would bear until the judgment is prescribed by limitation. Our attorney advises me to get a transfer of the judgment, and that would place title beyond any further risk. I have been put to a great deal of trouble and expense lately on account of imperfect titles to lands held by us in full warranty, and hope that you will excuse me if you find me unnecessarily particular. Under the circumstances I will agree to purchase the land for \$500 cash provided the judgment is transferred to me in proper form with the land.

Awaiting your reply, I remain, yours truly,

ALPHONSE LEVY.

This abstract of title contains the following data, viz: That this twenty arpent tract of land was sold in the succession of Cyprien Dupré on the 15th of January, 1873, for \$830 on terms of credit, and again in 1878 for the same amount in cash. At the foot of the abstract this statement is appended, viz:

"N. B.—The judgment of Zenon Broussard against the estate of Cyprien Dupré, deceased, *has never been cancelled.*"

While this correspondence was conducted by, and the interview took place with, Levy, he was acting for his associate, Meyers, as well as himself. Indeed, there is no express denial of this.

A few days after these negotiations were concluded, Cleonise Savoie executed a power of attorney authorizing Stelly to make a transfer of the judgment and the land, and soon after he passed the authentic act of sale. To this act there was appended no certificate of mortgages. It was expressly waived. During the progress of the negotiations, the defendant, Levy, explained his seeming anxiety in respect to the sufficiency of the title to the *land*, by stating it to have been defendant's intention to construct a rice mill on the property.

It is in proof that, previous to the execution of the power of attor-

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ney and title, defendants sent their attorney to see and interview the agent with reference to the purchase of the land.

On this subject the agent says: "Believing the statement of Mr. Levy in his letter, I advised the old lady to transfer the judgment, to cure the defect of title which Meyers claimed to exist." He further states that on the occasion of defendants' attorney's last visit, he left a power of attorney with him, which he had the old lady to sign, "as she was willing to sell the land and clear the title."

He says that said attorney stated to him that the one he left "was the form necessary to be followed, and that as soon as that power of attorney was signed, I could then come and pass the sale of the land and transfer the judgment." That, in a day or two afterwards, he went to Opelousas and completed the transaction, the said attorney having drawn up the act of sale.

At the time of these transactions none of the plaintiffs were aware of the existence of the lands that were subsequently sold as the property of the estate of Cyprien Dupré. On this subject Stelly says, that if he had known of their existence, or that of other property, he would not have induced Mrs. Broussard to transfer the judgment for the purpose of clearing the title to the land. He states explicitly that "not a cent of consideration was given for the judgment, and the only reason for transferring it, was to clear the title which Mr. Levy claimed to be defective. The \$500 was merely the price asked, and given for the land." That he exhibited and read the letters of Levy to Miss Ophelia and Mrs. Broussard, and that they all consulted together and "agreed to let the judgment be transferred to cover the defects in the title. Neither Mr. Levy nor Mr. Meyers ever offered to buy the judgment by itself, nor have they ever spoken to me about the judgment, except in the abstract as bearing a mortgage."

He says that he has since ascertained that all the representations in reference to the judgment operating a judicial mortgage on the land, were untrue in point of fact, and that the title was perfectly clear.

These statements of Stelly are corroborated in every essential particular by Miss Ophelia and Mrs. Broussard. Miss Ophelia says that she remembers that, before the sale of the land, Mr. Ogden offered \$750, part cash and the rest on a credit, for the twenty arpents of land, and the offer was refused because enough cash was not offered. Other evidence in the record establishes that the land was worth more than \$500. Mr. Levy says, as a witness, in speaking of the letter he wrote Mr. Stelly, that "in making the offer of \$500 for the twenty arpents of land, I was under the impression that the land was bounded

on the east by the railroad. *Some time after* the offer was made, and before the completion of the sale of the land and judgment, *and on inquiry*, I found that there *were intervening tracts* or lots between the railroad and the said tract. This discovery lessened, *in my mind and that of my partner*, the value of the land. We were not willing, after this discovery, to pay for the *land* the price *first* offered."

Mr. Levy did not communicate this fact, of such apparent importance, to Mr. Stelly, and he states that between the date of this discovery and the date of the sale he did not see him. Yet he accepted the title and paid the \$500 originally promised for the land. The defendants' attorney, as a witness, states that Mr. Levy came to see him and requested him to go to the parish of Lafayette "in order to purchase a piece of land near Opelousas, stating in substance that he would give \$500 for the piece of land, meaning, I think, 20 arpents, provided a certain judgment already attended to in this case would be transferred with the land."

This attorney was asked this question, viz:

"Q. What inducement did you offer Mr. Stelly, plaintiffs' agent, to transfer the judgment? For what purpose was the transfer made?

"A. The conversation between Mr. Levy and myself having occurred something over two years ago, I am not able to state positively the whole conversation that took place between us; but the impression that was made upon my mind was that *the cause, or one of the causes for the transferring of this judgment with the land, was in order to remove any question as to the title of the land.*"

Upon making an examination of the Levy letter addressed to Stelly, he says; "I consider that the said document embraces about the same proposition that I was instructed to make."

It appears that the judgment in controversy had never been recorded in the book of mortgages of the parish of St. Landry, and if, indeed, it had been so recorded, a judicial mortgage would not have resulted therefrom, because it was rendered against the administrator of the succession of Cyprien Dupré, and had only the effect of liquidating the debt and making it payable in due course of the administration.

Mr. L. Dupré, another attorney of the defendants, says as a witness: "I knew the judgment did *not* affect the twenty arpents of land at that time, and I never told any one that it did."

In answer to a question by plaintiffs' counsel, Mr. Dupré said:

"The conversation to which you allude, took place some two years ago. I cannot recollect any but parts of that conversation, as I have stated in my examination in chief. It is probable that Mr. Levy men-

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tioned the matter of the judgment to me. I know he seemed very anxious as to the title of the land." The question under consideration was the abstract of title, and that date and instrument were referred to.

It appears from the evidence that defendants were at, and previous to the date of the sale in controversy, engaged in a mercantile business in the city of Opelousas, and devoted considerable attention to land speculations and investments in that vicinity. It appears that, notwithstanding the objections urged by the defendants to the want of proximity of the land to the railroad, they accepted the title, paid the \$500 in cost, and entered into possession thereof, but nothing further is heard of the erection of a rice mill thereon. They subsequently sold the land. Their attention appears to have been *immediately* directed to the collection of the judgment. Another lawyer was consulted and employed with that view. The services of experienced land-experts were *at once* secured in pursuit of same object.

On the 2d of December 1885—only twenty days after the transfer—the defendants, acting through their recently employed counsel, filed a petition in the District Court of the parish of St. Landry, in which they represent themselves to be the transferors of said judgment, on which there is a balance remaining due of \$6000 and that they are entitled to have same executed. They represent that there is property which still belongs to the estate of Cyprien Dupré, "*some* of which is situated in the parish of St. Landry, and which should be sold to satisfy said judgment as far as it will go."

To this petition there is appended a list of the lands referred to. Reference to the list shows that there were 1552 44-100 acres. That all of them were entered at the Land Office in April and May 1860, and are situated in townships seven and eight, and ranges two and three.

On the same date an order was granted for their sale for cash, and same were sold on the 6th of January, 1886, with the exception of one small lot, to A. Levy & Co. for \$3100. On the 11th of January, 1886—only five days after the foregoing sale—the same parties filed another petition and procured another order for the cash sale of other lands of the estate of Cyprien Dupré, situated in the parish of Lafayette, a list of which is appended thereto. An examination of it discloses that all of these lands were likewise entered in April and May, 1860, and are situated in townships ten and eleven, and ranges three and four. Of them there are 1805.46 acres. On the 17th of February, 1886, there were sold and adjudicated to A. Levy & Co. a sufficient quantity of these lands to aggregate the sum of \$2435.40,

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and to another party \$168.68, and leave remaining unsold 798 acres. By these two sales there was yielded the aggregate amount of \$5696.08, less the expenses of sale, and within *less than three months from the date of defendant's acquisition of the judgment.*

Leonce Littel testifies that he was employed by Alphonse Levy, one of the defendants, *on the 21st of November, 1885*, as a surveyor, to locate the lands which were situated in St. Landry parish—those above mentioned. He says: "I returned on the evening before Thanksgiving day (November 25, 1885,) *after having spent three days in locating said lands.* * * * At the time he employed me he told me that I need not mention for whom I was locating the lands. The lands in said list are not worth less than three dollars per acre, average cash valuation."

He says that "most of said lands are good and cultivable." The gentleman who abstracted the titles of the lands which were sold in St. Landry states that he was employed by the defendants on the 13th or 14th of November, 1885, only a day or two after the transfer of the judgment.

In the month of December following he visited the Parish of Lafayette and abstracted the titles to the land sold in that parish in the month of February, 1886.

There are many other facts and circumstances which might, with equal propriety, be given a place in this opinion, as having an important bearing on the issues involved, but those already cited are quite sufficient to determine the validity of the sale.

III.

To much of this testimony the defendants objected, and excepted to the introduction of same in evidence; and particularly to that part of it tending to contradict, or explain the recitals of the act of sale and transfer, in respect to the consideration, on the ground that there was no allegation in plaintiffs' petition charging that such recitals were made in error. We are of a contrary view. There are several allegations which we have quoted, directly to the effect that Mrs. Broussard never sold or transferred the judgment for any consideration; that none was offered or paid by the defendants; and that the \$500 mentioned in the deed as the price thereof, was the price of the land, *exclusively*. These averments were ample, and quite sufficient for the attainment of the object aimed at. The testimony was properly admitted to the jury.

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IV.

The defendants' counsel urgently press upon our attention, what he considers a fatal defect in the initiatory proceedings—the want of a proper default, or putting *in mora*, upon the theory that this is in the nature of an action of damages *ex quasi contractu*, for the passive violation of a contract. But, in this, we feel bound to disagree with the learned counsel, for whose views we have the greatest respect. This is in no proper or legal sense an action of damages. It is a suit for the proceeds of the sale of property of the succession of Cyprien Dupré, which were applied to the satisfaction of the judgment in controversy, and which were illegally in the possession and under the control of the defendants, and who unduly received the same. In such case the want of a previous amicable demand should have been excepted to previous to default; after answer, such a plea is unavailing.

V.

It is quite unnecessary for us to protract this opinion for the purpose of summing up, discussing and making an application of the facts herein enumerated. No useful purpose would be attained by commenting on the motives which influenced the actions of the defendants, their agents and employees in the premises. It will suffice for us to state our conclusions in reference to the matter in hand.

They are, that it was the sole object and purpose of Mrs. Broussard to sell the twenty arpent tract of land to the defendants for the stipulated price of \$500. That it was the *real* purpose of the defendants to surreptitiously obtain the control of the judgment with the view of realizing on it as they did, and the possession and acquisition of the land was a secondary consideration with them. That when Levy stated in his letter addressed to Stelly, on the 21st of October, 1885, "that the mortgage would bear (on the land) until the judgment is prescribed by limitation," he must have known, as his attorney, Laurent Dupré, did, that there was no mortgage resting against the land, and, knowing this, he must have intended to create a false impression upon the agent's mind, as it did. That at the time of the transfer to the defendants, and before, they were fully advised of the existence of the lands of the estate of Cyprien Dupré which they caused to be sold soon after, and their value and availability constituted the motive for the acquisition of the judgment.

That Mrs. Broussard and her daughter and agent, were not aware of their existence, and had no convenient opportunity of ascertaining

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it. That, considering that the gratuitous transfer of the judgment was the result of artifice, and misrepresentations of the defendants, which superinduced error on the part of Mrs. Broussard, and which, if sustained, would cause the plaintiffs great injury, same should be annulled.

The Code declares that "fraud, as applied to contracts, is the cause of an error bearing on a material part of the contract, CREATED or CONTINUED BY ARTIFICE, with design to obtain some unjust advantages to the one party, or to cause an inconvenience to the other." R. C. C. 1847.

Not only should the transfer of the judgment be annulled and set aside, but the defendants' should be *sentenced* to make restitution or the amounts they have received.

But justice demands that the plaintiffs should allow such reasonable sums as may have been necessarily expended in the search, recovery and sale of the land.

But upon a careful examination of defendants' bill of particulars, and the evidence adduced in support of same, we are of the opinion that some reductions should be made, and the following is a list of items that are disallowed or diminished, viz :

The price of the land, disallowed.....	\$ 500 00
Clerk's fees and cost in Lafayette, disallowed.....	81 35
Surveyor's fees, diminished by.....	150 00
Services of C. C. Duson, disallowed.....	300 00
	<u>\$ 1031 35</u>

Total amount of reductions, aggregating one thousand and thirty-one and 35-100 dollars. This amount being deducted from the total credit claimed, \$2,711 35, will produce us the true amount of credit to which the defendants are entitled, viz : \$1680.

There is another item of credit claimed on the bill of particulars, viz: "Deduct 40 acres sold in error, \$60 00; and 160 acres in dispute, \$723 69=\$783 69." The proof on this question is not quite clear, and, for the purposes of justice, we will not conclude either party, but allow the credit, reserving the rights of the plaintiffs in another suit.

We find the amount realized to be.....	\$5,696 08
Amount to be deducted.....	<u>1,680 00</u>

Amount to which plaintiffs are entitled.....\$4,016 08

One half of this sum is due to the plaintiff, Cleonise Savoie, and the residue to the heirs of Zenon Broussard jointly and in indivision—the whole sum to bear legal interest from judicial demand.

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On the whole this is not such a case as should make the verdict of the jury of peculiarly binding force. It is stated to be a fact that the trial was a protracted one; many witnesses were interrogated in their presence; numerous deeds and documents were offered in evidence; and many perplexing questions of law are involved. There is no very serious conflict of testimony. Under these circumstances the jury may well have been misled as to the determinative facts, or decided the case under a misapprehension of the law. We deem it our duty, under a solemn conviction of the justice and equity of the plaintiffs' demands, to set their verdict aside and proceed to render a different judgment.

It is, therefore, ordered, adjudged and decreed, that the verdict of the jury and the judgment of the court *a qua* thereon based, be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that the sale and transfer of date November 12, 1885, in so far as the same purports to transfer and convey to the defendants the judgment in controversy, be and the same is annulled and set aside; and it is further ordered, adjudged and decreed, that the plaintiffs do have and recover of and from the defendants *in solido* the sum of five thousand six hundred and ninety-six and eight one-hundredths dollars, with legal interest from the 14th of July, 1886, same being the date of judicial demand, subject to a credit of the sum of one thousand six hundred and eighty dollars.

It is further ordered, adjudged and decreed, that the plaintiffs' rights be reserved to claim the sum of \$783 69, as above specified, and which has been allowed to defendants as a credit.

It is further ordered, adjudged and decreed, that all costs of both courts be taxed against the defendants and appellees.

ON APPLICATION FOR REHEARING.

Counsel have confined their application to alleged errors in the calculations made in our opinion and make claim for an increased allowance on defendants' reconventional demands.

1. An examination of the figures has disclosed one error, and that consists in our having taken as the basis of our calculation the amounts stated in the *proces verbaux* of sales. We think that was wrong. We now take the amounts stated in the defendants' bill of particulars, which shows the net balance after costs have been deducted, viz:

Proceeds of sale in St. Landry.....	\$2997 30
Proceeds of sale in Lafayette	2451 68—\$5448 98
In lieu of our former balance.....	5696 08

Difference	\$ 247 10
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2. We do not consider the item of \$81.35 *established* by the evidence. It forms no part of the cost of the sale of land in Lafayette parish.

3. With regard to the item of \$150 deducted from the surveyor's fees, his own receipt only shows that he received \$50, and the parol evidence does not satisfy us that the defendants *paid* any more for *that* service.

4. We think the deduction of \$300 from Mr. Duson's claim is but equitable and just. The only proof of the amount defendants paid him is his receipt. It is for \$860 "in full for services rendered in ferretting and locating properties belonging to the estate of Cyprien Dupré, said lands being situated in St. Landry, Acadia, Lafayette and Vermilion parishes, and for general services in the Baudoin case, and attending to the matter of Severin LeBlanc; all pertaining to the succession of Cyprien Dupré.

(Signed)

"W. W. DUSON."

He was not summoned or sworn as a witness. No explanation is furnished of the character or nature of the services he rendered. It appears that no land was *found* or *sold* in Acadia, or Vermilion parishes. It does not *appear* what connection there is between the transactions under consideration and "the Baudoin case" or "the matter of Severin LeBlanc." Considering the absence of proof, we think \$500 a liberal allowance.

The opinion allows a credit of \$1680. We will allow \$247 10 in addition—\$1927 10. This, we submit, is quite a large allowance for the collection of \$5448 98, particularly when the whole work was accomplished in less than ninety days, and through *ex parte* proceedings. But of this sum, \$247 10, there has been carried into the calculation made by us the sum of \$60, as shown by defendants' application. It must be deducted. The additional credit will then be \$187 10. But a rehearing is unnecessary.

It is, therefore, ordered, adjudged and decreed, that our former decree be and the same is corrected by allowing the defendants the additional credit of one hundred and eighty-seven and ten one-hundredths dollars, and as thus corrected and amended it remain undisturbed.

But inasmuch as we have made one reservation in behalf of the plaintiffs, we also reserve the defendants' right to sue for the items that are disallowed, viz: \$81 35, \$150 and \$300, aggregating \$531 35; but this reserve is not to affect the finality of our decree.

Rehearing refused.

McCall vs. Irion et al.

No. 1812.

OLIVIA MCCALL VS. A. B. IRION ET AL.—CHAFFE ET AL. WARRANTORS.

In a petitory action, exceptions filed by a defendant, the allegations of which, to be sustained, require the introduction of evidence of title upon which the exceptor must rely to maintain himself in the possession and ownership of the property, should be referred to the merits.

A party in possession of immovable property by an apparent judicial title cannot force the plaintiff to a trial on an exception that he must first bring a separate and distinct action to annul the judicial proceeding under which defendant relies for title.

Such a proceeding affords the defendant alone an opportunity to offer his evidence of title.

A PPEAL from the Twelfth District Court, Parish of Avoyelles.
Overton, J.

E. North Cullom, Jr., for Plaintiff and Appellant.

Thorpe & Peterman and A. B. Irion for Defendants and Appellees.

The opinion of the Court was delivered by

MCENERY, J. John Graham Wilson purchased, in 1857, from Sarah Akenhead, wife of John Akenhead, immovable property, situated in the parish of Avoyelles, one mile below Holmesville, containing some eighteen or nineteen hundred acres, being the undivided half of the Revelry plantation, for the price of sixty thousand dollars, payable in instalments, the last for \$18,600 falling due on the 1st of April, 1861.

The notes were secured by mortgage and vendor privilege. John G. Wilson failed to pay the last note. Sarah Akenhead died shortly after her sale of the property to Wilson.

John G. Wilson confessed judgment on said note, with recognition of mortgage and vendor's privilege, in favor of George R. King, the executor of Mrs. Sarah Akenhead. Judgment was obtained on this confession, and it was made executory on the 31st of October, 1886. Execution issued on the judgment, and the property described in the act of mortgage, the undivided half of Revelry plantation, was seized and sold at sheriff's sale on the 5th day of January, 1857.

Walter Akenhead and Sarah McMoth were the last and highest bidders, and the property was adjudicated to them for the price of \$4500. In his return on the execution, the sheriff stated that the purchasers had failed to comply with their bid. Walter Akenhead and Sarah McMoth, however, entered into possession of the property.

The sheriff's deed to them was never recorded until after the institution of the suit.

Walter Akenhead died in 1879, and his portion of the property was sold at succession sale and purchased by Henry M. Payne, on the 22d

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day of November, 1879. Payne sold this portion to A. B. Irion, on the 24th day of February, 1861. Mrs. Elizabeth McMoeth's portion was seized and sold under a writ of *fi. fa.* issued in execution of the judgment of Gertrude B. Akenhead, tutrix, vs. William and Jennie McMoeth. and was purchased by John Chaffe & Sons, who sold the property to Thomas D. Miller. A. B. Irion and Thomas D. Miller are the present possessors of the property acquired by John G. Wilson from Mrs. Sarah Akenhead. John G. Wilson died in the city of New Orleans in 1879.

Mrs. Olivia McCall, the plaintiff, instituted this suit against A. B. Irion and Thomas D. Miller, the parties in possession of said property and alleges in her petition that she is the sister and only legal heir of John G. Wilson; that her deceased brother was the owner of the property acquired by him from Sarah Akenhead until the day of his death, the 14th day of February, 1879. She alleges that he had never been divested of ownership of said property by legal process or conventional transfer, and that on or about the 5th day of January, 1867, Elizabeth McMoeth and Walter Akenhead, during the absence of her brother from the parish of Avoyelles, took possession of the undivided half of the property known as the Revelry plantation, and that they never acquired title to said property or any portion thereof, and that, having no right or title to said property, they could not convey a legal title to said property, and that Alfred B. Irion and Thomas D. Miller are in possession of said property without legal right, and that they are possessors in bad faith. She prayed for judgment decreeing her to be the owner of said property and for a moneyed judgment against each of the defendants.

The defendants, Irion and Miller, answered and called their vendors in warranty, H. M. Payne, warrantor of A. B. Irion, and John Chaffe, Christopher Chaffe and W. H. Chaffe composing the firm of John Chaffe & Sons, the warrantors of Thomas D. Miller. The warrantors appeared and excepted to the action. They allege that Walter Akenhead and Elizabeth McMoeth became the purchasers of said property at a judicial sale and obtained a regular sheriff's deed to the same, and that the plaintiff cannot ignore the judicial proceedings by which John G. Wilson was divested of his title and possession, nor can she contest said proceedings in any other way than by a direct action to *cancel* and set them aside, and prayed for a dismissal of the suit. The plaintiff filed a motion to refer this exception to the merits. The motion was overruled. On the trial of the exception, judgment was

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rendered in favor of the warrantors. From this judgment the plaintiff has appealed.

The plaintiff's suit is a petitory action founded upon the title which her brother, John G. Wilson, acquired by purchase from Sarah Akenhead, and with which she says he never parted by any legal process or conventional transfer. There is no allegation in the petition of the facts disclosed on the trial of the exception. The defendants and warrantors on the trial of the exception, by *documentary* and oral evidence, set out the title upon which they, on the trial on the *merits*, would rely to be maintained in the possession and the ownership of the property.

The plaintiff could not, on the trial of the exception, offer any evidence as to her title. The exception alleged matters which it required evidence to sustain, and of such a character as could only be considered on the trial of the case when at issue and on the merits. The authorities referred to by appellees to support the position taken by them on the exception, were all cases in which there was a trial on the merits, and do not sustain the position that, before bringing this suit, the plaintiff was required to bring a separate and distinct suit to set aside the judicial proceedings under which Walter Akenhead and Sarah McMoith went into the alleged ownership and possession of the property.

The judge *a quo* erred in annulling the motion to refer the exception to the merits.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from be annulled and reversed, and this case be remanded to the lower court to be proceeded with according to law, the appellees to pay costs of the appeal.

FENNER, J., recused on the ground of affinity to Warrantor Payne.

No. 1,318.

MARY E. GLAZE, WIFE, ET AL. VS. C. C. DUSON, SHERIFF, ET ALS.

- ▲ *dation en paiement* by a husband to his wife, whereby she assumes and agrees to pay debts of the husband to his vendors, is a contract not authorized but prohibited by law, and does not pass the property from the former to the latter
- ▲ *dation en paiement* of property consisting of movables and of an interest in real estate, for one and the same price, is indivisible, and must stand or fall as an entirety; but this is not the case where two distinct valuations have been put on each class of property.
- ▲ a contract which sets forth two distinct considerations, for two different objects, although for one main purpose only, is legally divisible, and will be maintained as valid in part notwithstanding the other part be absolutely void, as prohibited by law.

A PPEAL from the Thirteenth District Court, Parish of St. Landry. Estilette, J.

Thomas H. Lewis, for Plaintiffs and Appellants.

Kenneth Baillio, for Defendants and Appellees :

1. Plaintiffs cannot be heard to set up exceptions as means of defense, and to have them tried separately, and in advance of the merits. This system of pleading and practice is confined to defendants. C. P. 20.
2. Contracts between husband and wife as a general rule are forbidden. C. C. 1790; 30 Ann. 293. Their capacity to contract is exceptional, and limited to certain specified cases. C. C. 2446, 1 Ann. 301; 2 Ann. 483; 4 Ann. 65; 5 Ann. 600; 14 Ann. 601, 21 Ann. 466; 23 Ann. 439; 26 Ann. 375; 27 Ann. 173; 28 Ann. 758; 30 Ann. 293; 33 Ann. 532.
3. The wife, whether separated in property by contract or by judgment, or not separated, cannot bind herself for her husband, nor conjointly with him, for debts contracted by him before or during the marriage. C. C. 2398. Such contracts are prohibited, and are absolutely null, and the creditors of the husband may disregard them, and seize property so transferred to the wife without resorting to an action of nullity. 1 Ann. 301; 2 Ann. 483; 4 Ann. 65; 5 Ann. 600; 14 Ann. 601; 21 Ann. 466; 23 Ann. 439; 26 Ann. 375; 27 Ann. 193; 28 Ann. 758; 30 Ann. 293.
4. Whatever is done in violation of a prohibitory law is null. C. C. 12.
5. The prescription of one year has no application to contracts between husband and wife, which are prohibited by law. See authorities referred to in No. 3.
6. A judgment affirming a *dation en paiement* made to the wife adds nothing to it. 30 Ann. 226.
7. A *dation en paiement*, in which the wife assumes the debts of the husband is null, and such assumist vitiates the whole contract, which is one and indivisible, and avoids the whole contract. See authorities in No. 3.
8. A contract is morally impossible if forbidden by law. C. C. 1892.
9. An intervenor claiming property under seizure must show conclusively that the property is his.
10. On the dissolution of an injunction defendants are entitled to 20 per cent on amount of the judgment as damages. C. P. 304. Also to counsel fees as special damages. 17 L., 263; 4 Ann. 304; 12 Ann. 239; 2 L. 102; 5 L. 246; 14 Ann. 333.
11. A plaintiff in injunction is, however, not entitled to counsel fees as damages. See No. 10; 19 L. 357; 13 Ann. 449, 193; 14 Ann. 311, 757, 826; 10 Ann. 563.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The plaintiff enjoins the sale of certain property, seized by a judgment creditor of her husband, and charges that it belongs to her, for having been given to her by him, in payment of her claims against him.

The property consists in movables and in a two-third interest in certain real estate.

The defense is, that the *dation en paiement* is an absolute nullity, for the reason that the wife has, by the act, assumed anterior claims, debts

due by her husband, and that such assumption is expressly prohibited by law.

There was judgment annulling the *dation*, as concerns the interest in the real property, but maintaining it as to the movables, as to which the injunction was perpetuated.

There was a reserve made in favor of plaintiff for the assertion and vindication of what rights she may have, in some other proceeding.

The defendants pray for an amendment of the judgment by an allowance of damages sustained in consequence of the wrongful issuance of the injunction.

The plaintiff also asks that damages be allowed her for the wrongful seizure of the property, and which consist in her liability for counsel fees.

The case was ably argued by counsel on both sides, and the reasons assigned in writing by the learned judge *a quo* show that it received at his hands an elaborate and thorough examination.

The act of *dation en paiement* enumerates the items of liability of the husband to the wife, showing it to amount to \$4751.

It shows that, in order to secure her against loss, he gives, assigns, sets over and delivers unto her, stock and farming utensils and his two-third interest in certain real estate, that seized by the judgment creditor and now claimed by the plaintiff.

The price is credited with the sum of \$1615, and the rest \$2900, due by the husband to the Tucker heirs, his vendors, is assumed by the wife, with the distinct statement that the same will be paid to them by her.

It is evident that this contract between a husband and a wife not being authorized by, comes within the ban of, article 1790 R. C. C., which expressly prohibits all transactions between such parties, when the same are not formally sanctioned and legitimated.

A long line of precedents establishes beyond dispute, that the capacity of such parties to contract is restricted to cases specially mentioned, and that it is immaterial, whether the wife be or not separated in property from the husband. She is not, in any case, permitted to bind herself or her property either with or for her husband, for debts due by him, whether before, or after marriage.

It is true that there are precedents, from which it appears that the wife has been recognized the right of acquiring encumbered property, the amount secured by anterior mortgages or privileges being deducted from the purchase price, but there are also cases in which a different doctrine has been formerly announced.

All the authorities may well be reconciled by the simple distinction that a wife may acquire *cum onere*, without making herself personally liable, while she is not allowed to do so where she assumes to pay the debt as her own, the debt of her husband.

The reason for this is obvious, that in the first case she retains the amount and takes the property with the privilege of surrendering it, in the event of an hypothecary action or the like, without incurring any personal obligation, should it not realize sufficiently to satisfy the debt, and that, in the second case, that of assumption, not only would the property be liable to seizure and sale, for the judgment of the debt, but besides, would she, in case of deficiency, be personally responsible, and her separate estate subjected to the payment of the wanting amount.

Hence, the laborious effort of the plaintiff to establish that she did not assume, but acquired *cum onere*. This is unavailing, as the fact is indisputable that she accepted the *dation*, with the express understanding that she assumed the debt of her husband to his vendors, *binding herself to pay it to them*.

The argument has no force, that a married woman can legally accept a *dation en paiement* by her husband, even though she agrees to assume to pay a debt of his, secured on the property at the time of the the contract between them, *provided* the transaction *enures* to her benefit.

The distinction might have more weight were the Spanish law which once prevailed here still in existence, but such is not the case 61st Toro; 7 M., 465.

No reasoning has been offered, or authority quoted to support the proposition.

The contract must or not be valid, at the date of its formation, and cannot be made to depend upon contingencies, particularly when the rights of third parties may be affected thereby.

Were the contract between the husband and the wife in this case one between a third party and the wife, a question might well arise, whether the wife would acquire such property for her own account, and whether it would not be a purchase for the benefit of the community.

The spectacle would be presented of a wife having no more than \$1615 in cash, and no prospect of acquiring more, purchasing property for thrice the amount on hand.

The law does not favor speculations of such a character by a mar-

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ried woman. It watches with as much solicitude over them and their property as it does over minors and their estate. 16 Ann. 215.

The act of *dation* does not discriminate in the price, which is one for both, the stock, the implements of husbandry and interest in the land, and the transaction being a unit, cannot be legally divided.

It cannot stand as an entirety, and must, therefore, be completely undone and fall, with the declaration that the property which was the object of it not having passed from the husband to the wife, was liable to seizure by the former's creditors.

The *dation* having been made in violation of a *prohibitory* law is a nullity, and the *asserted* writ may be proceeded with.

We think that the execution of a money judgment having been arrested by the injunction, and the writ having been dissolved as wrongfully obtained, the seizing creditor is entitled to special damages for attorney's fees in obtaining the dissolution, which may be put down at \$150.

It is, therefore, ordered and decreed, that the judgment appealed from be reversed so far as it maintains the *dation* of the movables, and perpetuates the injunction as to them; and it is now ordered, that said injunction be dissolved as to said movables.

It is further ordered, that said judgment be amended by allowing the defendants' seizing creditors the sum of one hundred and fifty dollars;

And that thus reformed and amended said judgment be affirmed with costs.

ON REHEARING.

The plaintiff complains that this Court erred in not recognizing her title to the movables given to her in payment, by her husband, and which were seized under the writ of the judgment creditor.

In support of that complaint her counsel calls our attention, for the first time, to the consideration, which he admits not to have urged before, that in the *dation* the movables were valued at a price totally distinct from that fixed for the interest in the land.

Verification establishes that, indeed, the movables which were not encumbered had been valued at \$1075, while the land interest was appraised at \$4515.

A discrimination thus being legally possible, the *dation* is not an indivisible unit, and can well be severed.

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In other respects the plaintiff acquiesces in the correctness of the opinion delivered.

It is, therefore, ordered, that our previous decree, so far as it reverses the judgment of the lower court maintaining the *dation* of the movables and perpetuates the injunction as to them, be set aside, and considered unwritten, and it is now ordered, that said judgment be affirmed, and that in other respects, our said decree remain undisturbed.

No. 1317.

THE STATE EX REL. STERN'S FERTILIZER AND CHEMICAL MANUFACTURING COMPANY VS. CITY OF NEW ORLEANS ET AL.

The amendment of Article 207 of the Constitution of 1879 which exempts from taxation and license manufacturers of ice, fertilizers and chemicals, is not retroactive and does not exempt them from taxes and licenses due prior to the adoption of the amendment.

A PPEAL from the Civil District Court, Parish of Orleans.
Rightor, J.

Gus. A. Breaux for Relator and Appellee.

W. H. Rogers, James Moise and *W. B. Sommerville* for Respondents and Appellants.

The opinion of the Court was delivered by

McENERY, J. The City of New Orleans appeals from a judgment rendered against her, ordering the cancellation of the taxes and tax inscriptions in her favor and against Stern's Fertilizer and Chemical Manufacturing Company for the years 1880 to 1888, inclusive. The cause of action of the relator is based upon the amendment to Article 207 of the State Constitution adopted at the late general election, and officially promulgated May 12, 1888. Article 207 as it originally stood in the Constitution of 1879, exempted from taxation and license for ten years the capital, machinery and other property employed in the manufacture of textile fabrics, leather, shoes, harness, saddlery, hats, flour and agricultural implements.

The article as amended extends the exemption from the adoption of the Constitution of 1879 for a period of twenty years, and includes in the exemption manufacturers of ice, fertilizers and chemicals. The relator contends that the amended article exempts the articles which they manufacture from the period of the adoption of the Constitution

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of 1879. The intention in the submission of the amendment to the people by the General Assembly, and its adoption by them was to re-enact Article 207, and to extend for a longer period the exemption from taxation and license the capital, machinery and other property employed in the manufacture of textile fabrics, leather, shoes, harness, hats, saddlery, flour and agricultural implements, and to further amend the article by including in the list of exemptions manufacturers of ice, fertilizers and chemicals. The object and intention in the adoption of the amendment was to preserve the original article as amended—to continue the exemptions and to extend the period from taxation and license, and to include other manufacturers of articles not found in the original article and which were not exempt from taxation and license. The intention was evidently to continue for an additional period manufacturers of articles already exempt, and to add others thereto, and the fixing of the period for all the articles manufactured, from taxation and the manufacturers from license from the adoption of the Constitution of 1879, was to make the Article 207 as amended consistent and uniform.

The amended Article 207 is not retroactive. The Stern's Fertilizer and Manufacturing Company owe taxes, as shown by the record, for a period extending from 1880 to 1888 inclusive. It was not the intention in the adoption of the amendment to said article to exempt said company and its property from taxes due the city of New Orleans or the state, prior to the adoption of the amendment. No presumption or implication will justify such a conclusion. Had there been an intention to exempt from taxation and license the manufacturers of ice, fertilizers and chemicals, it would have been stated in unambiguous terms. There would have been some legislation to relieve those who were exempted by the article as amended and who had paid the tax and the license. It would be manifestly unjust to relieve those who had not paid, from their obligations to pay, and to have retained the amount of those who had promptly discharged their duty as citizens and paid their license and tax. Some provision would have been made to avoid this inequality and injustice, had it been the intention in the adoption of the amendment to make the amended article retroactive. We, therefore, conclude that Article 207 of the Constitution of 1879, as amended, exempts from taxation and license the manufacturers of ice, fertilizers and chemicals, only from the date of the promulgation, the 12th day of May, 1888, of the amendment to Article 207 of the Constitution of 1879.

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It is, therefore, ordered that the judgment of the lower court be avoided and reversed and plaintiff's demand rejected with costs in both courts.

ON APPLICATION FOR REHEARING.

The plaintiff, in the application for rehearing, says: "And this makes it certain that the purpose was as far as possible to place all manufactures named, on absolutely the same footing of exemption, not only for the period of extension, but for the entire period of twenty years from the adoption of the Constitution of 1879." Was it the intention in the re-enactment of the article to remit the taxes and licenses due by plaintiff prior to the 12th of May, 1888, and to retain to other manufacturers exempted by the amendment the amounts they had paid into the State treasury during the same period?

If so, language and terms would have been used to convey this intention. The manufacturers of certain articles exempted in the original article are also covered by the amended article, when they had already been exempted for a period of ten years. What then, was the object in exempting them in the amended article for a time for which they had already been exempted? It was evidently the intention to extend the period of their exemption by the simple method of re-enactment, and the plaintiff was included only as an amendment to said article, the period of exemption to commence only from the time the extension was given to the manufacturers originally exempted. There is no language in the article to convey the meaning that it was the intention to release plaintiff from taxes and licenses due, or to return taxes and licenses already paid into the State treasury.

In the case of Dennis, sheriff, vs. Railroad Co., this court quoted as follows from *Fertilizing Company vs. Hyde Park*, 97 U. S. Reports 666, in the construction of a legislative contract: "The rule of construction in this class of cases is that it shall be most strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakable terms or by an implication equally clear. The affirmative must be shown. Silence is negative and doubt is fatal to the claim. The doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this court."

In the case of Dennis, sheriff, vs. Railroad, it is stated that exemptions are granted either by general or special laws. When they are granted as a gratuity, as a bounty, they can be revoked at pleasure;

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while, when they enter into and form part of a contract in the shape of a charter, they must continue in force as agreed upon. The rule of construction in both cases is the same as to meaning and scope. 34 Ann. 954.

By Act 113 of 1882, submitting an amendment to Article 146 of the Constitution, it was adopted and amended so as to exclude the officers of the Criminal District Court from a participation in the judicial expense fund.

Article 130, by an act passed at the same session of the General Assembly, was also amended at the general election of 1884. Suit was brought by the officers named in the amendment to Article 146 to restrain the treasurer from paying warrants *drawn* prior to the adoption of the amendments, claiming a preference out of the funds arising from the sale of stamps after the promulgation of the amendments. They assumed that Article 130 created a new and abolished the old Civil District Court; that the effect of the amendment to Article 146 was to establish an absolute preference on the judicial expense fund in favor of the officers of the new Civil District Court over the outstanding warrants in favor of the officers of the abolished court. In this suit, McGeehan vs. State Treasurer, 37 Ann. p. 156, this court said: "So far as the latter amendment (Art. 146) is concerned, we are clear that its only intention and effect were to relieve the fund from subjection to *future* criminal expenses.

"The stamp system, and judicial expense fund were established by Articles 145 and 146, and they continue to-day, the same system and the same fund, originally provided unaffected by the amendment to the latter article, except as to the changes *hereafter* affecting them. When this amendment was adopted the warrants then outstanding had a legal and valid right to be paid out of the accumulations of said funds in rotation of months and by preference over all warrants of later date."

No cunning of dialectics can evade the self-evident proposition that to give the amendment an interpretation destroying such vested rights would be to give it a retroactive effect.

It is presumed that the manufacturers not exempted by Article 207 prior to its amendment from taxation and license, have paid their licenses and taxes. To obtain restitution, a special act of the General Assembly would be required. Article 43. If it had been the intention to remit the taxes and licenses of plaintiffs and to return the licenses and taxes already paid into the treasury, the article would have made

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it mandatory upon the General Assembly to enact the necessary legislation.

It would not have been left to the discretion of the legislative branch of the government; the State in its bounty would have left no doubt as to its interested generosity and munificence. If there be a doubt it is adversely construed.

Rehearing refused.

 No. 1322.

40	701
44	429

SUCCESSION OF RENÉ GAGNEUX.—ON OPPOSITIONS TO ACCOUNTS.

In the absence of prayer and proof that a dative executor had received sums of money from the executor, his predecessor, no judgment can validly be rendered against him.

In order to recover from such predecessor, suit must be brought against him or, in case of his death, his succession. Although prescription be suspended against the creditors of an insolvent, the principle is inapplicable to successions, whether solvent or insolvent. The right of a mortgage creditor is lost by the failure to reinscribe within ten years, although previous to the expiration of that delay the mortgagor had died.

But no reinscription is necessary when the mortgaged property is sold within the ten years. Payment of a judgment not reinscribed and not revived cannot be sought after the expiration of the ten years by which it is prescribed.

A PPEAL from the Twenty-fifth District Court, Parish of Lafayette.
Debaillon, J.

Breaux & Renoudet for the Executor, Appellant.

Crow Girard and M. E. Girard for the Opponents, Appellees.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The original executor presented an account setting forth receipts \$369 70 and disbursements \$418 51, and mortgage claims of several parties named, aggregating a little upwards of \$2500.

In connection with these claims which he placed on a footing of equality, he stated that the proceeds of property on hand, when realized, would be applied to those creditors concurrently.

At his death this account had not been homologated, and A. Adler, one of the creditors claiming a mortgage, had himself appointed dative executor and qualified.

After selling the property undisposed of, he prepared an account to propose a distribution of proceeds, and opposed the account of his predecessor.

By this account he acknowledges the amount on hand, proceeds of the unsold property, some \$1900, and states privilege claims for some \$200.

Referring to the account filed by his predecessor, he charges that it

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is deficient in not accounting for \$750, the proceeds of the sale of some land received by the executor; he denies the liability of the estate in favor of the parties placed thereon as creditors; claims that the succession of the executor should be made to account for the \$369 70 admitted by him to have been collected. He further charges that he himself is a mortgage creditor for \$525 27, as transferee of Hirsch and Adler & Co., mentioned in the account, and that he is entitled to be paid in preference to all others.

Some short time after the filing of his account, he opposed that presented by his predecessor, which has not as yet been homologated, urging substantially the same complaints.

His account is opposed by other parties, who contest his pretensions to a first rank.

The district judge rendered judgment holding the dative executor liable for the \$750 and \$369 70, over and above the amount acknowledged by him, (some \$1909), the aggregate amount being \$2479 70. The court admitted liabilities for \$793 05 and decreed that the residue, \$1686 65, be distributed *pro rata* among the parties claiming to be mortgage creditors, on the ground that they had, by themselves or their agents, agreed to be put on the same level.

From this judgment the dative executor appeals.

His complaints are :

1. *That* he ought not to have been charged with the amounts which had come to the hands of his predecessor and which he has never received; and,
2. *That* his claim ought to have been recognized with a first ranking mortgage and paid accordingly.

I.

It does not appear from the oppositions filed to the account presented by the dative executor, that any opponent asked that he be held liable for the two amounts in question, and even had there been prayer to that end, it is impossible to conceive how he could have been thus held in the absence of proof that he had received them, or that by his fault and negligence, the amounts which could have been recovered had become dead losses to the creditors.

Had the pleadings and proof been other, then surely the dative executor could have been held; but certainly, under the showing made, there is error in the finding against him.

The opposition of the dative executor to the account of his deceased predecessor, though a salutary, was an insufficient proceeding to fasten judicially upon the succession of the latter, the liability for the two amounts.

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The opposition was salutary in this, that it prevented the homologation of an account charged with incorrectness and error; but it was insufficient to warrant, even if well founded, any judgment against the succession of the executor, which had not been made and was not a party to the proceeding, on a proper issue.

The proper action should have been a direct suit by the dative executor against the administratrix of the executor's succession for a judgment for the two amounts.

It therefore follows, that, on the face of the proceedings, neither the estate of the executor, nor the dative executor could have been held responsible to the creditors of the succession for those two amounts, however true it may be, that there is proof in the record that the executor has actually received in cash and notes the \$750, proceeds of the land sold by him.

II.

The next question to be determined is: whether the dative executor is, in his individual capacity, a mortgage creditor for the amount stated, with first rank, so as to be paid by preference over all others.

Premitting all inquiry into the validity of the alleged agreement, by which it is claimed that A. Adler, or those whose transferee he is, had consented to forego the rank now claimed, and which would perhaps require unnecessary attention, as it would involve the extent of the power of the party that undertook to act as an agent on the occasion, it is safer to consider whether, if the claim was once entitled to a first rank, it has or not lost that privilege and advantage.

The mortgage was consented on November 30th, 1875, and was recorded on the same day in the proper mortgage book of the proper office. René Gagneux died on the 25th of February, 1876, in a state of thorough insolvency, and the mortgage has never been reinscribed.

In the succession of Flower, 12 Ann. 216, the Court held that, although prescription does not run, but is suspended, against the creditors of an insolvent, the principle is inapplicable to successions, whether solvent or insolvent, and that, consequently, the right of a mortgage creditor is lost by the failure to reinscribe, within ten years, although before the ten years had expired the mortgagor had died.

The court rested its reasoning and conclusions on Art. 3327 of the Code of 1825, which is now Article 3363 of the Revised Code.

This ruling has been followed since. See 27 Ann. 527 (552), 630; 28 Ann. 811, and is adhered to.

For that reason, at least, the judgment of the district court, placing the creditors not privileged on an equal footing, is correct.

It is therefore ordered and decreed that the judgment appealed from,

Succession of Gagneux.

as far as it holds the dative executor liable for the two sums of \$750 and \$369 70, amounting together to eleven hundred and nineteen dollars (\$1119), be reversed, and it is now ordered and decreed that said dative executor be declared not to be liable therefor.

It is further ordered and decreed that the right of the dative executor to recover the same from the succession of his predecessor, E. E. Mouton, by a direct action, be recognized and reserved.

It is therefore ordered and decreed that, thus reformed, said judgment be affirmed, the costs of appeal to be paid by the succession.

ON REHEARING.

I.

The dative executor justly complains that by the judgment here rendered, Queyrrouze & Bois, who claim to be judicial mortgage creditors, and who were ranked among the mortgage creditors by the district judge, were not stricken from among them.

It appears that the judgment on which they claim, was rendered on December 22, 1875, that, not only never was it reinscribed in order to preserve the mortgage secured by the inscription, but that it has besides never been revived. It is therefore clear that the claim has ceased to have any existence whatever.

It was incumbent on Queyrrouze & Bois, in order to be retained on the account, to have proved, not only their judgment, but its inscription, reinscription and revival and this without the necessity of the filing of any plea of prescription against it. This formed part of the evidence necessary to make out their case.

II.

The dative executor is also right when he charges that his individual claim as a mortgage creditor ought to have been allowed with the first rank.

We held that, as the mortgage had not been reinscribed within the ten years, the inscription of the mortgage had perempted. Such is no doubt the law, but the law does not apply to cases in which the property mortgaged has been *sold* within the ten years and proceeds reduced to possession. 8 Ann. 505; 13 Ann. 557.

Our attention is called to the material fact, which we had not discovered in the mixed up transcript in the case, that the property mortgaged in favor of Hirsch, Adler & Co. was actually *sold* within those ten years and that the proceeds are in the hands of the dative executor.

It therefore follows that a reinscription would have been an idle and barren ceremony.

This, now, necessarily imposes upon us the inquiry, whether, as was held by the District Judge, the first rank to which Adler & Co. were entitled, had been relinquished so as to constitute them, or their assign, A. Adler, a simple ordinary creditor.

We have looked carefully into the matter and have ascertained that the power of attorney given to E. E. Mouton in relation to this claim, merely conferred upon him the right to collect the claim and consequently to enforce the mortgage.

Surely, he had no authority to give up to any extent the security by which the claim was guaranteed and the consent which he gave to have the same placed among the ordinary debts, was wholly unauthorized and is not binding on Adler.

As the mortgage was the *first* recorded, it *first* affected the property and is entitled to the *first* rank.

As the claim will absorb the residue of the proceeds of the real estate sold at the instance of the dative executor, it would serve no useful purpose to pass upon the pretensions of the other mortgage creditors, whose rights are reserved, should the dative executor realize funds from the succession of E. E. Mouton, the executor, and propose to distribute them.

It is, therefore, ordered and decreed that the last portion of our previous decree which affirmed the judgment appealed from, be set aside, and

It is ordered and decreed that said judgment be reversed, and

It is now ordered and decreed that the names of Queyrrouze & Bois, figuring among those of the mortgage creditors, be stricken therefrom and that A. Adler be recognized to be entitled to be paid as first mortgage creditor out of the proceeds of the property securing his claim, and that the rights, if any, of the other parties claiming to be mortgage creditors be reserved to be exercised when other funds are realized and proposed for distribution.

It is further ordered that thus amended, our previous decree remain undisturbed and that the costs of appeal be paid by the succession.

No. 1319.

EASTIN & BREAUX VS. BOARD OF SCHOOL DIRECTORS.

When the principal and sureties on an official bond are sued together, the judgment as to the principal is *res adjudicata* as to the sureties, and within the limit of the amounts for which they are held under the terms of their bond, they are bound to make good the entire judgment against the principal, including the penalty.

Eastin & Breaux vs. School Directors.

A PPEAL from the Twenty-fifth District Court, Parish of Lafayette. *Debailion, J.*

M. E. Girard & Crow Girard for Plaintiffs and Appellants.

R. C. Smedes, District Attorney, and *C. D. Caffery* for Defendants and Appellees :

1. He who pleads payment must prove it by preponderance of evidence and beyond doubt. 18 Ann. 238; 23 Ann. 84; 24 Ann. 288.
2. The plea of payment admits the validity of the obligation. 9 Ann. 528; 12 L. 397; 14 Ann. 54; 25 Ann. 173; Hen. Dig. p. 1150, 47 No. 6.
3. Facts which could have been urged before payment cannot be urged as grounds for an injunction. 21 Ann. 485; 26 Ann. 34; Louque, p. 311 (b), 27 No. 3.
4. The plea of general denial puts at issue all the allegations of plaintiff's petition, and the judgment thereon will form *res judicata* as between the parties.
5. The surety is liable for the five per cent per month penalty imposed upon a defaulting school treasurer. 7 Ann. 121-596; 10 Ann. 492; 14 Ann. 679.

The opinion of the Court was delivered by

FENNER, J. The board of school directors brought suit on the official bond of J. N. Judice, against him and his sureties, Eastin and Breaux, to recover a sum of \$2641.72, for which said Judice, as treasurer of the board, was a defaulter, in which they recovered judgment against Judice "for \$2641.72, with five per cent per month interest thereon from August, 1886," and against Breaux and Eastin, each, "for the sum of \$2500, with legal interest of five per cent per annum from judicial demand"—\$2500 being the amount for which each had bound himself as surety on the bond.

This judgment was appealed from and affirmed by this Court. *School Directors vs. Judice*, 39 Ann. 896.

That this judgment operates as *res adjudicata* as to the amount of Judice's indebtedness binding on all the parties to that suit, does not admit of question.

It does not lie in the mouth of the present plaintiffs to dispute its correctness.

The judgment against themselves for \$2500 each, with legal interest, is equally beyond dispute; but, as they are sureties only, of course that judgment can be enforced against them only to the extent necessary to satisfy the judgment against their principal.

But to the extent of their principal's liability and within the limit of the judgment against themselves, they are undoubtedly and irrevocably bound.

The board issued execution on its judgment for the total amount of the judgment against Judice, including the penalty of five per cent

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per month. The sureties claim that they are only liable for the principal amount, with legal interest, and on this ground they enjoin the execution.

There is not the slightest merit in their contention. It is not pretended that more is claimed of either of them than the amount for which they were adjudged to be liable; and within that limit they are unquestionably bound for the debt and penalty adjudged against Judice.

It is well settled that sureties on official bonds are liable for the penalty as well as for the principal amount of the claim against the officer. 7 Ann. 121, 596; 10 Ann. 492; 14 Ann. 679; State vs. Powell, 40 Ann.

The judge did not err in dissolving the injunction.

Judgment affirmed.

No. 1816.

CHARLEY BARBE VS. THOMAS HANSEN ET ALS.

Several individuals enter into an agreement to become the sureties *in solido* of another, on the following terms, viz: Their principal was to purchase from a third person a quantity of land which he was to buy from the United States government at \$1 25 per acre, and which was to aggregate in value a stipulated sum, and whereupon a special mortgage and vendor's lien was to be retained as a security therefor.

Their principal's vendor was to give his consent thereto, and on this condition the securities signed a note in his favor.

Such third person, as payee of this note, purchased land of the government, but not for the aggregate amount specified; but he sold it to their principal for that amount.

Held: That proof of these averments does not establish a want of consideration, in the absence of proof that the land conveyed was worth less than the price it sold for.

A PPEAL from the Twenty-fifth District Court, Parish of Lafayette.
Debaillon, J.

A. R. Mitchell and M. E. Girard for Plaintiff and Appellee.

Geo. H. Wells for Defendants and Appellants.

The opinion of the Court was delivered by

WATKINS, J. On the 22d of March, 1884, the plaintiff sold to the defendant, S. H. Clement, a tract of land for \$2300, for which he executed his promissory note, and consented to a special mortgage and vendor's lien thereon as securing the same.

This note was signed by the other defendants, Thomas Hansen, A. Rigmsiden and H. C. Drew, as securities *in solido*.

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The act of sale and mortgage contains the stipulation of ten per cent attorney's fees in the event of suit, and the non-alienation clause.

Suit *via ordinaria* is brought against the principal and sureties, and judgment is demanded against them *in solido* for the principal and interest of the debt, and the ten per cent attorney's fees; and also, for the recognition and enforcement of his special mortgage and vendor's lien on the land.

For answer the securities make the following declaration, substantially, viz :

That they signed the note in error, and there was a want of consideration for their signatures, in that before they signed same, and at the time they were requested by Clement so to do, the latter informed them that he wished to procure the sum of \$2300 from the plaintiff for the purpose of purchasing timbered lands from the United States government, and on which he proposed to secure them by mortgage when purchased.

That afterwards and before reaching a final agreement, one of their number informed the plaintiff and Clement that if the former would himself purchase lands from the government with said sum of money, instead of advancing the \$2300 to Clement, and would then sell the land to Clement for \$2300, and retain a special mortgage and vendor's privilege thereon to secure the payment of the purchase price, he and his associates would sign Clement's note as securities. That this arrangement was consented to by the plaintiff and Clement, and "it was upon this agreement and understanding that they signed the note sued on."

They charge that by means of a fraudulent collusion between the plaintiff and Clement, and without their knowledge, "the plaintiff did not use the whole amount of said sum of \$2300 in the purchase of government lands" by the sum of \$500, which he loaned to Clement, and the contrary recital of the plaintiff's petition and act of sale are untrue.

They further aver that if they were to pay said note to plaintiff they would thereby become subrogated to his rights of privilege and mortgage as against their principal, and "therefore they have been seriously injured and defrauded by said collusion and fraudulent conduct * * * because if plaintiff and said Clement had performed, in good faith, (their contract), as aforesaid * * * the said Clement would have had nearly \$500 worth—at the government price of \$1 25 per acre—of said lands *more*, than he acquired by his said purchase" on which such mortgage and privilege would have rested;

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and that, by this means, and to [this extent, their security has been, and would be reduced in the event of their making payment with subrogation.

Subsequently they amended their answer by averring that since their original answer was filed they have been informed that the plaintiff really employed in his purchase of land from the government only a little more than fifteen hundred dollars, and that he did not loan any portion of the \$2300, which was the ostensible consideration of the note and nominal price of the land which he conveyed to Clement.

They allege the intervening insolvency and pending and undetermined cession of Clement, and pray for their entire release and discharge from liability.

On the hearing the judge *a quo* disregarded the defense set up and gave judgment as prayed for by the plaintiff, and defendants have appealed.

In this Court the plaintiff and appellee requests us to give him judgment of ten per cent on the amount of the judgment appealed from, as damages for the prosecution of a frivolous appeal.

We have taken pains to give in detail the substantial averments of the defendant's answers for the sake of precision, and for the reason that we regard them as stating no defense to their liability on the note.

Their is neither allegation in their answers nor proof in the record of the inadequacy of the land mortgaged as a security for the debt. Hence, if they should pay it, they could, presumably, be reimbursed. What matters it to them if their theory be correct, and that representations were made as stated, if their security be ample?

The fact that their principal has become insolvent since the note was executed, and has made a cession under the insolvent law, does not absolve them from either their obligation or duty. Neither does his surrender impair the value of their security or deprive them of their right to procure a seizure and sale of the property.

The proof is positive to the effect that the land is worth \$2300, and has not been disposed of by the syndic of the insolvent.

With regard to the rights of mortgaged and privileged creditors of an insolvent, see *Spears vs. His Creditors*, decided at Monroe at our recently adjourned term. The judgment appealed from is correct and should not be disturbed; but we do not regard this as a proper case for the infliction of damages for the prosecution of a frivolous appeal.

Judgment affirmed.

Louis et al. vs. Giroir et als.

No. 1315.

DON LOUIS JEAN LOUIS ET AL. VS. THÉRENCE GIROIR ET ALS.

A patent granted by the United States under Sec. 2447, U. S. Rev. Statutes, operates only as a quit-claim or relinquishment of any claim on the part of the United States to the land, and is without prejudice to adverse claimants.

When it concerns land which had passed into private ownership under Spanish grants, ante-dating the cession to the United States, and subsequently confirmed by acts of Congress, such land will be considered as having been fully severed from the public domain, from the date of such confirmation, and fully subject to prescriptive titles.

Finding that defendants have established all the elements essential to maintain their plea of prescription, it must be sustained.

A PPEAL from the Twenty-fifth District Court, Parish of Lafayette. *Bourges, J., ad hoc.*

Felix & Dan Voorhies for Plaintiffs and Appellants.

M. E. Girard for Defendants and Appellees:

If the party who claims the land has acknowledged that the title of ownership is in his opponent, his alleged ownership is destroyed. 39 Ann. 1033.

In a petitory action met by the defense of the prescription of ten years, the main legal discussion involves the question of the alleged just title, the good faith and the length of time of defendant's possession of the property in controversy. The legality or validity of the plaintiff's title is a question of secondary consideration, which comes up in case only the defendant's plea of prescription should not be found good. 38 Ann. 209, Barrow vs. Wilson.

Good faith purifies the title of its defects and causes the possessor under a just title to be preferred to the true proprietor, who has remained so long neglectful of his rights. 38 Ann. 885, Pattison vs. Maloney.

Certificates of purchase from land office made in accordance with law operate an equitable severance of the land from the public domain. 83 Ann. 249, Gay vs. Ellis, and authorities. And it becomes subject to private contracts and adverse prescription. 35 Ann. 931, Lariviere vs. Perrodin; 35 Ann. 540, Lavidau vs. Trinohard.

Confirmation by the United States is but a relinquishment of all claims on their part leaving the titles as under the former government in contests between different claimants. Hen. 1272, § 1, No. 3; 5 R. 457.

A grant complete under the French or Spanish government required no confirmation to give it validity under ours. The former government had no legal power or discretion over it, and none passed to the United States under the treaty. It was and has remained private property, which no legislation of Congress could affect. Hen. 1263 (c) 6.

The United States are bound by the treaty ceding Louisiana to protect the private property of the inhabitants. Hen. 1263, No. 13; 5 Ann. 636.

A private statute, such as an act of Congress conferring private claims, should be introduced in evidence. The court will not take, judicially, notice of it. 28 Ann. 413, Marsden vs. Savings Institution; 33 Ann. 963, Bank vs. Converse et al.; Hen. p. 1272, B, § 1, No. 3; 12 Ann. 883; 2 Ann. 148; Hen. p. 1276, Nos. 17 and 18; Louque, p. 590, No. 3; 590 B, No. 1; 9 P. 117, Hen. p. 1263, No. 6; 3 Wall. 478; 18 Wall. 245; 103 3 U. S. 593.

The opinion of the Court was delivered by

FENNER, J. This is a petitory action, brought by the legal representatives of Jean Louis, deceased, to recover certain lands in the possession of the several defendants.

The title set forth in the petition is as follows: "That said property belongs to your petitioners for having inherited the same from Jean Louis, f. m. c., who had title thereto by virtue of a confirmation from Congress and by a patent issued in or about the year 1880 or 1881 by the government of the United States in favor of said Jean Louis."

In support of this title, plaintiffs offer: 1st, a report or decision of the Register of the Land Office, dated Nov. 10, 1880; 2d, a certificate of survey by the Surveyor General of Louisiana, dated Dec. 13, 1881; 3d, a patent from the United States government, dated January 16, 1882.

From these documents it appears that the claim of Louis is based upon a purchase by him from *Saville Bourse*, who held under a Spanish grant, and occupation and cultivation for eighteen consecutive years preceding December 22, 1815, upon a certificate of survey made by the United States Surveyor, dated June 22, 1814, and upon confirmation by act of Congress, approved February 25, 1825.

The decision of the Register simply recognizes the validity of the foregoing claim, but concludes as follows: "This decision shall in nowise be considered as precluding a legal investigation and decision by the proper judicial tribunal as between the parties to the above conflict of claims, but shall only operate on the part of the United States as a relinquishment of all title to the land in question."

The patent also contains the statement that "this patent shall only operate as a relinquishment of title on the part of the United States, and shall, in no manner, interfere with any valid adverse right to the same land, nor be construed to preclude a legal investigation and decision by the proper judicial tribunal between the adverse claimants to said land."

From the foregoing it is apparent that these documents do not operate, or purport to operate, as a present conveyance of the lands, but are a recognition of a prior divertiture dating back to the Spanish régime, from which date, unquestionably, the land covered by it was severed from the public domain, had passed into private ownership, and was subject to all the modes of acquiring ownership provided by law.

The defendants claim under Spanish grants yet more ancient and equally confirmed by the government of the United States.

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If the conflict of the original titles was open to investigation, the only questions that would arise would be: Which grant embraced the land in controversy? and, in case it was covered by both, which was the superior title? But, however those questions might be decided, there could not be the slightest doubt that the land had passed into private ownership before the cession to the United States, and never became incorporated into the public domain of the latter, and that, therefore, the confirmations, patents and other dealings of the United States government with reference thereto were simply recognitive and intended and purporting to operate as mere quit-claims.

There is, therefore, no obstacle to the right of defendants to plead prescription against the action brought by plaintiffs. *Lavidan vs. Trinehard*, 35 Ann. 540.

They have pleaded the prescription of ten and thirty years, and the former was maintained by the judge *a quo*.

His decision is manifestly correct.

This land has been held and dealt with as owners by defendants and their authors from a very ancient date. Their possession and occupation for more than ten years prior to the institution of this suit have been complete and unequivocal. Their good faith does not admit of question. Their titles rest on sales fully translativ of property received from persons whom, without doubt, they believed to be the real owners. It is only necessary to read the articles of the Code treating of this prescription to see that defendants' possession combines every element therein prescribed as necessary to support the plea. *C. C. Arts. 3478 to 3498; Barrow vs. Wilson*, 33 Ann. 209; *Patterson vs. Maloney*, id. 885.

Judgment affirmed.

No. 1320.

CHARLES M. THOMPSON, AGENT, vs. C. C. DUSON, SHERIFF, ET AL.

An instrument of writing acknowledging the receipt of a specified sum as a part of the purchase price of a tract of land, the title to which is to be executed at a future date, and the terms of which are to be ascertained by reference to another instrument, is not a sale which transfers the ownership of the property, but is only a promise of sale, on the conditions imposed, and confers the right on the promisee to compel performance on the part of the promisor.

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A PPEAL from the Thirteenth District Court, Parish of St. Landry. *Estillette, J.*

W. S. Frazer, for Plaintiff and Appellee.

Kenneth Baillio, for Defendants and Appellants:

1. A promise to sell amounts to a sale between the parties if clothed with the formalities, provided by C. C. 2440; C. C. 2462, 2456.
 2. *Id centum est quod certum reddi potest.*
 3. A vendor's privilege springs from the law alone. C. C. 3249; C. N. 2103; 31 Ann. 729.
 4. A suspensive condition is never implied, it must be expressly stipulated. So, in a promise to sell, a vendor cannot defeat the rights of a vendee who has been in possession for several years, by insisting that he (the vendor) has not the benefit of a special mortgage to secure the price when none was expressly stipulated.
 5. The mere form of a contract will not be looked to so much as the essence of the contract and the real intent of the parties. Hen., p. 1000, No. 4 and cases cited.
 6. In construing it, the manner in which a contract has been executed and treated by both parties, will be considered to determine its true nature. C. C. 1956; Hen., p. 1012, No. 7.
 7. The construction will be against a vendor, or a promisor in a contract to sell. Hen., p. 1012, No. 6.
 8. Executed contracts. Hen., p. 1011, Nos. 7, 9, 11 and cases cited.
 9. Obligations of the ancestors pass to the heirs. C. C. 671.
 10. Unconditional heirs are absolutely bound. C. C. 689.
 11. Acceptance by heirs is express when they assume that quality in a judicial proceeding. C. C. 68.
 12. Plaintiffs in this suit stand in the place of their mother, and are bound by her contracts. They are not third parties to her contracts.
 13. When a person by his words or conduct causes another to believe in the existence of a certain state of things, and induces him to act upon same, he is estopped from averring against him a different state of things. Bigelow on Est., pp. 64, 65; 30 Ann. 50.
 14. A judicial mortgage attaches, though the title to real estate be not recorded. 35 Ann. 829.
 15. A promise to sell, with no reciprocal agreement that a formal sale shall be executed, and with no express stipulation to that effect in favor of both amounting to a proviso or suspensive condition; amounts to a sale between the parties, and will be so treated, where the promisee has gone into possession. 11 R. 349; 12 R. 474; 5 Ann. 656; 6 Ann. 26; 1 L. 314; 3 N. S. 586, 336; 2 L. 460; 6 N. S. 433. The case is different where such agreements or stipulations are expressly included in the contract to sell, amounting to a suspensive condition, and where the promisor remains in possession.
 16. In cases such as the one at bar a mortgage attaches to promisee's property. 12 R. 474.
 17. A general denial puts at issue plaintiff's capacity where he sues in a representative capacity. 5 L. 405; 7 Ann. 621.
- Acceptance of promisee may be proved by evidence dehors the act. 2 L. 460; 3 N. S. 563.
- If the Kilpatrick heirs were unaware of the transfer of T. to his wife they should have clearly proved it. Hen., p. 485, No. 2.
- Plaintiff in injunction cannot recover counsel fees as damages. 17 L. 263; 4 Ann. 304; 12 Ann. 239; 2 L. 102; 5 L. 246; 14 Ann. 333; 19 L. 357; 18 Ann. 449, 193; 14 Ann. 811. 757 820; 16 Ann. 563; 35 Ann. Calvet vs. Williams.

The opinion of the Court was delivered by

WATKINS, J. Under a writ of *feri facias*, issued under a judgment in the suit entitled John Chaffe & Sons vs. C. P. Thompson, three-

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fifths undivided interest in the Joel Tucker plantation was seized and advertised for sale in satisfaction thereof, and plaintiff, representing the heirs of Mrs. M. W. Kilpatrick, enjoins the sale of one third of said three-fifths thereof on the ground of ownership by their title of inheritance.

The sheriff and seizing creditors join in one answer. They plead the general issue and no cause of action, and aver that the plaintiffs and their deceased mother were well aware of the fact that, for a great while before the seizure complained of, C. M. Thompson and his wife not only claimed said property as owners, but had recorded titles to the rights of Mrs. Kilpatrick, and that Mary E. Glaze, the wife, at, and antecedent to the said seizure, was in the possession thereof as owner, under a *dation en paiement* from her husband, and which had been theretofore duly recorded, and against this assertion of title same is urged as an estoppel.

They further aver that Mary E. Glaze has also enjoined this seizure and sale on the ground of her ownership of the *whole* of the three-fifths interest, including that of Mrs. Kilpatrick, grounded on that *dation*, and on that account, aver that neither of their demands are serious or *bona fide*, and are only intended to *obstruct* their legal proceedings.

They pray for the dissolution of the plaintiff's injunction, with statutory damages of ten and twenty per cent on the amount of the judgment sought to be executed, and special damages of \$250.

On the trial the judge *a quo* sustained and perpetuated plaintiff's injunction and quashed the seizure of that part of the property claimed without damages, and the defendants have appealed.

Our decision must turn upon the construction of the following instrument of writing, viz:

“NAVASOTA, Grimes County, Tex., Jan. 30, 1880.

“Received of Chas. J. Thompson, of the parish of St. Landry, State of Louisiana, the sum of five hundred dollars, said amount being the first payment of a part of the purchase-price of a piece of land situated in the parish and State aforesaid, on the left descending bank of Bayou Bouf. The titles to said lands not yet being made, I hereby obligate myself, my heirs and assigns to make a title to said land, to the said Thompson, when he shall call for the same.

“The terms and conditions of the sale being the same as those in the sale of Mrs. L. B. Waller unto the said Thompson, for a portion of the same tract of land.

“(Signed)

MARY W. KILPATRICK.

“I authorize my wife to sign the foregoing instrument of writing.

“(Signed)

A. R. KILPATRICK.”

The plaintiff's petition avers that this "instrument of writing" was not intended by their mother to actually and really convey their interests in the property, but that same was only a promise of sale, which was never executed during their mother's lifetime, or since. It is a noteworthy fact that there is no averment in the defendants' answer to the effect that it was a *sale* to Thompson, but, in lieu thereof, the allegations quoted were made of acquiescence and estoppel.

In *Broodwell vs. Raines*, 30 Ann. 677, this Court had under consideration quite a similar instrument. Its concluding paragraph is as follows, viz:

"Titles to said property to be made at our own convenience, as per our *private* agreement."

The Court says: "Under this agreement, Lane (the promisee), took possession of, and cultivated the plantation for seven years, during which he paid nothing on the purchase-price, and at the end of which he was heavily involved in debt."

Then they proceed to discuss the question of Lane's ownership under this document, and say: "The mere reading of this instrument * * is conclusive on our minds that this was not a sale, but a mere conditional promise to sell.

"The first part of the agreement seems to convey the idea of a sale, but the reference to the *titles*, which are to be made at a future time, shows clearly that the contract was not translati^ve of property, and did not operate a mutation of title."

Citing *Knox vs. Payne & Harrison*, 13 Ann. 361, and *Garret vs. Crooks*, 15 Ann. 483,

The two instruments are so perfectly alike in respect to the reference to the execution of titles, that we deem it unnecessary to cite further authority.

In the one under present consideration, the condition is, that the promissor agrees "to make a title * * to the said Thompson when he shall call for the same," while in that just referred to, the titles were to be made at the *mutual convenience* of the parties.

The language employed in the promise of sale to Lane, viz: "I have this day bargained, sold and delivered" are wanting in that to Thompson; and, if the former was correctly held not to be translati^ve of property, the latter's certainly cannot be. We regard the opinion in the case cited as perfectly correct, and hold that the instrument under consideration to be only a promise on the part of Mrs. Kilpatrick to sell to Thompson, which did not operate a mutation of title, and which

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only entitled him, upon full compliance with the conditions therein stipulated, to compel her to make title.

The fact that Thompson entered into a joint possession of the property with others, and used the revenues, and afterwards made a conveyance to his wife, does not exercise any influence over the title, or alter its *status*. The proof does not satisfy us that plaintiff had been advised of the conveyance to Mary E. Glaze. They resided then, and reside now, in the State of Texas, and, while there are some circumstances pointing to their knowledge of it, they are altogether too inconsequential for a court of justice to act upon. The judgment of the court *a qua* does substantial justice between the parties. The demand of plaintiff for damages was properly rejected.

Judgment affirmed.

ON APPLICATION FOR REHEARING.

1. The fact that the defendants' counsel did not specially aver that the instrument in question was a title, and operated a mutation of the ownership of Mrs. Kilpatrick in the land, was only cited a ground in support of the converse of that proposition.

The opinion concedes that, whether that instrument was a title or not, was a question in the case, and decides it.

2. Our opinion does not lay any particular stress on the question of consideration.

The Code provides that "a promise to sell *amounts to a sale* when there exists a reciprocal consent of both parties as to the thing and the price thereof; but, to have its effect, *either between the contracting parties, or with regard to other persons*, the promise to sell must be vested with the same *formalities* as are prescribed in articles 2439 and 2440, concerning sales, in all cases where the law directs that the sale be committed to writing." R. C. C. 2462.

From these provisions we take it to be clear, that "a reciprocal consent of both parties as to the thing and the price thereof" is essential, and is of the essence of a *promise of sale*, as well as of a *sale*.

There was evidently such "a reciprocal consent" between Mrs. Kilpatrick and Thompson. But those provisions make the further requirement that the promise of sale must be clothed with the same *formalities* as a sale, in order that it shall have effect.

One of the most important of these is an act which purports to transfer the property. R. C. C. 2440. Such we understand to be the true import of the word "act," which is contained in the article. True, it is, that no set phrase, or form of words is necessary to over-

Richard et al. vs. Bergeron et al.

ate a translation of property ; but the ones employed must, of themselves, clearly express that object.

In the instrument we are considering there are no such words, or phrase. On the contrary, the instrument is given the form of a receipt for a portion of the purchase-price advanced upon a sale of certain property which was to be completed and titles executed to Thompson, as vendee, when he "shall call for the same." This instrument is wanting in the essential formality that is necessary to give it effect as to the creditors of Thompson as a conveyance of the property. It does not vest a title in him.

3. The defendants' counsel, in their application, propound this question, viz :

"Why not declare document A to be a sale, and at the same time decree that the Kilpatrick heirs shall be paid by preference, out of the (proceeds) of the sale, the balance due them on the purchase, before the seizing creditors?"

We are at a loss to see how this *could* be done.

The creditors have dealt with the land as the property of their debtor, and seized it. Plaintiffs enjoined the advertised sale, claiming ownership. Title *vel non* is the only issue. If the title did not pass for one purpose it could not have passed for another. If this promise of sale contains obligations which the defendants, as the creditors of Thompson, may acquire and enforce, this is not the proper proceeding for its ascertainment, or determination. We feel bound to relegate them to some other proceeding for that purpose.

Rehearing refused.

No. 1321.

LAPERLE RICHARD ET AL. VS. JEAN B. BERGERON ET AL.

Where the judge *a quo* properly dismisses a suit for insufficiency of evidence to establish plaintiff's demand, and the defendants asks that it be affirmed, the judgment will not be disturbed.

A PPEAL from the Thirteenth District Court, Parish of St. Landry.
Lewis, J.

L. L. Bourges and L. T. Tansey, for Plaintiffs and Appellants.
John H. Ogden, for Defendants and Appellees.

The opinion of the Court was delivered by

MCENERY, J. The plaintiff, authorized by her husband, as the forced heir of her father, Theodore Richard, alleges that she is entitled to one-seventh of his succession.

Thompson vs. Walker, Executor.

She brings this suit to annul the sales of certain property in the town of Arnoudville, made by her father to N. A. Guilbeau, and from Guilbeau to Bergeron, from Bergeron to Louisa Comeux, and from Louisa Comeux to N. A. Guilbeau, because they were simulations. The property was assessed in the name of Guilbeau, and was sold for taxes, and bought by defendant Bergeron.

This tax sale is also attacked.

The district judge dismissed the case because the plaintiff failed to establish her demand. After a careful examination of the evidence we concur with the district judge, that the evidence was insufficient to support the allegations in her petition.

The defendants, in their brief, state, "we content ourselves by asking for an affirmance of the judgment."

Judgment affirmed, plaintiffs and appellants to pay cost of appeal.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT OF LOUISIANA,

AT
SHREVEPORT,
IN
OCTOBER, 1888.

JUDGES OF THE COURT:

HON. EDWARD BERMUDEZ, *Chief Justice*

Hon. FÉLIX P. POCHÉ,	}	<i>Associate Justices.</i>
*Hon. CHARLES E. FENNER,		
Hon. LYNN B. WATKINS,		
Hon. SAMUEL D. McENERY,		

*Absent during this term.

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No. 220.

THE STATE OF LOUISIANA vs. JAMES HENDRICKS AND D. M. JAMESON,
SURETY.

A defendant who files a special plea is to be judged on that plea and none other. All else is admitted.

Hence, a surety who denies his signature to a bail bond, which is an act under private signature, on a proceeding to forfeit the same, the accused not appearing when called is barred from all other defences, the signature once proved.

The principle applies whether the proceeding, which is intrinsically civil, be considered as civil or criminal in form.

The consent of an accused, when arrested to correct a misnomer in the affidavit and in the warrant, will debar his surety on an appearance bond of the right of urging that the name of the principal in the bond is different from the name in the affidavit.

The surety on an appearance bond furnished when the accused was in custody, and by which he was released is estopped from subsequently alleging irregularities or other defects of form in the confection of the bond.

State vs. Hendricks.

A PPEAL from the Fourth District Court, Parish of Jackson.
Bridger, J.

J. Henry Shepherd, District Attorney, for the State, Appellant :

1. Justices of the peace shall have power to bail or discharge in criminal cases not capital or necessarily punishable at hard labor. Const. 1879, Art. 126: "Whoever shall be guilty of larceny shall be imprisoned at hard labor, or otherwise, not exceeding two years." Sec. 812, R. S.
2. The binding force of a recognizance does not depend upon the fact that the court before which the accused is required to appear has jurisdiction of the offence charged, but upon the duty and power of the magistrate to examine and admit the accused to bail. *Waterman's Criminal Digest*, page 68, Sec. 92.
3. A bond proves itself, and the law under which it was taken fixes the nature of a liability of the sureties toward the State, 7 Ann. 541, *State vs. Lewis*.
4. It is not sacramental that a written order should issue to the sheriff by a magistrate for the sheriff to take bail. *State vs. Wyatt et al.*, 6 Ann. 701.
5. Where an accused is in custody of the sheriff, and by the execution of the bond the surety obtains his release, he is estopped from gainsaying the regularity of the bond or the regularity of the proceeding in which it is allowed. 13 Ann. 299; 14 Ann. 783; 16 Ann. 141; *State vs. Nicol*, 30 Ann. 630.

E. E. Kidd and *F. W. Price* for Defendant and Appellee :

1. The bond furnished by the accused after preliminary examination, was required to secure his appearance at the next District Court. R. S. 1010, Sec. 4. Any insertion in the bond for any further or different appearance was unauthorized and may be considered as unwritten. On the appearance of the accused at first term of the District Court, after he was permitted to give bond, the obligation was cancelled and the sureties discharged. 34 Ann. 62, Sec. 3.
2. The judgment of forfeiture cannot stand. The bond was given apparently without authority. It states on its face that it is given to answer a charge of murder, and bears date of the time of arrest, January, 1882. The bond that was ordered to be given at the March term of 1882, when the information for assault with the intent to murder was filed, was never given. It is not the bond that was required by the court. It antedates the time of filing the information and order permitting and prescribing the bond. 37 Ann. 202, *State vs. Williams*.
3. Where the record does not show that at the term of court for which defendant was bound to appear, an entry was made on the minutes of the court for the continuance of all causes not disposed of, the sureties on a bail bond will not be liable on default taken for failure to produce the body of defendant at a subsequent term of the court. 6 R. 417.
4. Where judgment has been rendered against one who had executed a bond to appear and answer a criminal charge against his surety, but it does not appear from the judgment, or any part of the record, that the accused was called upon his bond to answer the charge preferred in said bond, and no stipulation contained in said bond required defendant to answer any charge made by a grand jury, any judgment rendered against the sureties for failure to answer to an indictment preferred by a grand jury subsequently should be set aside.
5. The order (of the judge) should be so framed as to leave nothing to inference or conjecture, and it should be entered of record in terms sufficiently definite to identify the offence and the offender. 10 Ann. 550.
6. The sheriff is without power to take a bail bond, unless authorized to do so by an order

State vs. Hendricks.

- of the court admitting the prisoner to bail and fixing the amount of the bail required, 6 Ann. 700; 6 Ann. 744; 12 Ann. 324 and 349; 10 Ann. 532; 13 Ann. 285; 37 Ann. 200; 38 Ann. 545.
7. An order of the court committing the prisoner, fixing the amount of the bond and authorizing the sheriff to take and approve a bond must be in writing. 6 Ann. 700 and 701.
 8. Parol evidence of an order without suggestion of its loss or destruction is entirely opposed to the rules of evidence. To supply or alter the record by parol proof after they were made up, read and approved, would be most dangerous. 6 Ann. 800.
 9. The magistrate should have named and approved the security, and given a written order to the sheriff to discharge the prisoner on his executing the bond. But if he approves the bond after it is taken it is sufficient to bind the surety. 6 Ann. 701, State vs. Wyatt & Nicholls.
 10. A bill of exceptions that neither states the objection nor reason of the court will not be noticed by the court.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The State appeals from a judgment of the District Court annulling a previously rendered one, forfeiting the bond of the accused and condemning the surety therein to pay the amount thereof, the former failing to appear at the term when he was called to do so, the latter failing to produce then and there his body.

It appears that Hendricks was arrested by a justice of the peace on the charge of larceny, and was released on a bond for \$300, with D. M. Jameson as surety therein, conditioned, substantially, that if the above bounden Hendricks shall appear at the jury term of the District Court, at the town of Vernon, Jackson parish, commencing on the first Monday of February, 1888, to answer the charge of larceny, and shall there remain from day to day and term to term, and shall not depart thence without leave of court, the obligation to be null and void, otherwise, to remain in force.

It further appears that a true bill was found against said Hendricks on February 11, 1888, and that a bench warrant was issued for his arrest, which took place on August 18 following, he having failed to appear on August 14 preceding, when the bond furnished by him was forfeited and the surety, Jameson, condemned to pay the amount thereof.

On the day following that of the forfeiture, Jameson took a rule to rescind the judgment *nisi* on the sole ground that *he had never signed the bond*, which rule was discharged by the court.

Subsequently, the surety took another rule, averring other grounds for which the judgment of forfeiture should be annulled. This rule was treated as an answer, putting at issue the right of the State to demand the forfeiture.

State vs. Hendricks.

After hearing, the District Court annulled the judgment of forfeiture and released the defendant as surety.

From this judgment the State appeals.

It is manifest that the proceedings below were palpably irregular and unwarranted.

After the judgment of forfeiture had been rendered, instead of asking that it be set aside and the matter reinstated as a motion, by the State for the forfeiture, the surety made a solitary defence, as though he had been called upon to answer a rule to forfeit, and that defence was that he had never signed the bond in question. The issue then was tried by the court and determined adversely to the surety.

Now, instead of applying for a new trial, the surety took a rule, setting forth technical grounds, tending to affect the regularity of the bond and of the proceedings under which it was furnished, and the State, instead of objecting to this mode of proceeding, prayed that the rule be treated as an answer.

We deem it unnecessary to pass upon any of such grounds, for the reason that it is a well established principle of law, which has never been deviated from, that one who files a special plea is to be judged on that plea and none other. All else is admitted; and this, apart from the consideration that it may perhaps be claimed as settled, that a surety who, upon the execution of a bond, obtained the release of an accused in actual custody, is estopped from gainsaying the regularity either of the bond or of the proceeding under which it was allowed.

The principle applies whether the proceeding be considered civil or criminal.

Intrinsically, the proceeding may be viewed as civil in character. It is based on a contract under private signature, on which a money judgment can be rendered, which may be executed on the issuance of a *f. fa.* It is not a proceeding for the recovery of a fine inflicted for the commission of an offence.

In so saying, we do not lose sight of the fact that it has been treated as a criminal proceeding, in order to determine questions of jurisdiction in cases of appeals from judgment of forfeiture of bail bonds.

The rules laid down in the Code of Practice on the subject of suits and obligations, or acts under private signature, are in consonance with the above announced principle, and may serve as safe guides in the determination of the matter now under consideration.

That Code provides that when the demand is founded on an obligation, or an act under private signature, alleged to have been signed

State vs. Hendricks

by the defendant, he shall be bound, in his answer, to acknowledge or deny his signature, C. P. 324; also, R. C. C. 2244; and that, if his signature has been proved, he shall be barred from any other defence, and judgment shall be rendered against him without further proceeding. C. P. 326. See, also, Burbanks' case, 9 Ann. 528; Commercial Bank, 24 Ann. 362; 22 Ann. 439; 12 L. 11; 8 U. S. 329, and 1 Ann. 325.

Now, the signature of the surety, after the denial thereof, was fully proved below, so much so that he does not complain, on this appeal, to the contrary.

It is, therefore, ordered that the judgment appealed from be reversed, and it is now ordered and decreed that the rule of Jameson, the surety, to rescind the judgment declaring his bond herein forfeited, be discharged; that said last judgment remain undisturbed, and that, accordingly, the State of Louisiana recover of the defendant, D. M. Jameson, the sum of three hundred dollars, with legal interest, from the date of forfeiture, August 14, 1888, per annum, and costs in both courts.

ON APPLICATION FOR REHEARING.

POCHÉ, J. Counsel for the surety complain that, in construing their rule to set aside the judgment *nisi*, forfeiting the appearance bond furnished by the accused, this Court entirely misunderstood the true meaning and purport of their pleadings, and they disclaim any intention on the part of the surety to thereby deny his signature to the bond which he had signed, his only purpose being to deny any liability on the bond which the court was proceeding to forfeit, for reasons therein set forth.

The language of the rule is very vague and quite inartistic, rendering a proper construction of the same an embarrassing problem. We are, therefore, disposed to accept the construction given to the document by the counsel themselves, and we shall now consider the merits of the points presented in their application for a rehearing, as well as the contention argued in the original brief.

1. Their first point rests on the contention that the forfeiture of the bond was predicated on an indictment, and not on the original bond, and on the denial of the existence of any charge in any court against said Hendricks, and for whose appearance the mover was bound. The bond executed by the surety was conditioned to secure the appearance

of Hendricks, the principal, at the next jury term of the court, "and there remain from day to day and term to term," etc.

This language certainly contemplated his appearance after an indictment had been found against him, or otherwise the whole proceeding would have been worse than a judicial farce. And his failure to appear when called to answer to the indictment was a breach of the essential condition of the bond, for which a forfeiture was legally warranted. The denial of the existence of any charge against Hendricks is presumably intended to refer to the fact that the affidavit before the magistrate was directed against "*James Henry*," and not *James Hendricks*, showing nothing more than a misnomer, which could be corrected with the consent of the accused, and that consent is proved by the execution of the bond by both principal and surety, with special reference to the charge as originally made against James Henry. Hence, they are now both estopped from taking any advantage from the misnomer as above stated. The bond before the Court had been executed by *James Hendricks*, the indictment found by the grand jury was against *James Hendricks*, and the forfeiture flowed from the non-appearance of *James Hendricks*, and as he bound himself, so will the surety be bound.

2. In view of the condition of the bond, as above quoted, the objection that it was not forfeited at the term at which the accused was bound to answer, but at a subsequent term, is too trivial for consideration.

3. It is also contended that the bond was not ordered or accepted by the justice of the peace, and that the sheriff accepted the bond without a written order from the magistrate. The minutes of the justice of the peace court show that the bond was ordered and the amount thereof fixed by the magistrate. And his testimony and that of the sheriff both show that the latter was authorized by the justice of the peace to accept the bond. A verbal order to that effect was sufficient, and no authority can be invoked to show that a written order would be necessary to legalize such a bond. But as several of these objections involve only alleged irregularities, the surety is estopped from urging them by the fact, as shown by the sheriff's returns and also by the minutes of the magistrate's court, that the accused was in actual custody when the bond was executed, and that he was thereby released. Having reaped the advantages and realized the object of the bond, the parties cannot be allowed to avoid its effect or be heard to gainsay the regularity of the proceeding. *State vs. Mosley*, 13 Ann.

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299: State vs. Badon, 14 Ann. 733; State vs. Canady, 16 Ann. 141; State vs. Nicol, 30 Ann. 628.

We, hence, conclude that the objections which go to the substance of the bond are not sustained by the record, and that the complaints touching alleged irregularities are met by an effective estoppel.

These considerations lead us to the same judgment heretofore rendered by us.

It is, therefore, ordered that our previous decree remain undisturbed. Rehearing refused.

No. 235.

THE STATE OF LOUISIANA VS. HENRY BROWN ET AL.

The refusal of the judge in a trial for murder to charge the jury that under the laws of Louisiana, "in all trials for murder the jury may find a verdict of manslaughter," in accordance with section 785 Revised Statutes of 1870, is a fatal error, which will vitiate the verdict found against the accused, and entitle him to a new trial.

A PPEAL from the First District Court, Parish of Caddo.
Hicks, J.

J. Henry Shepherd, District Attorney, for the State, Appellee:

1. The action of the court below in denying a motion for a continuance, will not be reversed in the absence of a showing that the court has abused its discretion. The matter of continuance is within the sound discretion of the district court, and the Supreme Court will not interfere in such matter unless the action of the lower court involves palpable injustice. 31 Ann. 179; 32 Ann. 1003 in particular. 33 Ann. 262, 681; 36 Ann. 153, 852.
2. It must be an arbitrary and oppressive exercise of power on the part of the court in refusing a continuance to justify the interference of the Appellate Court, and the remanding of the case. *C. J. Bermudez in State vs. Chevalier*, 36 Ann. 86, 852, 877.

The onus rests upon the accused to show the same affirmatively. 37 Ann. 128.

3. Due diligence must be shown to have been used. Diligence is a matter of fact upon which the judge's opinion is, if not conclusive, surely presumptively correct. The Appellate Court will not go to counter it, unless the record shows that the judge was wrong. The mere declaration in the affidavit that the diligence was used, does not conclude the judge. It may so happen * * * that the judge had before him the proof that due diligence was not used as alleged. 37 Ann. 129.
- "Is it credible that a prisoner about to be tried for his life would not compel an important witness to give recognizance to attend the trial, and thus secure his testimony, if the witness was truly material? All that enters into the question of the diligence." *State vs. Clark*, 37 Ann. 130; 39 Ann. 420.
4. When the life and liberty of a prisoner are at stake and the prisoner confined in a dungeon, it is the duty of the sheriff in charge of subpenas for his witnesses, to go to his dungeon and obtain from him any information which may enable him to execute the process of the court; nor is this all, their return must show what inquiries they have made, from whom, and where those inquiries were made, to find the prisoner's witnesses. * * * They must state every fact which in their opinion justifies their belief. *State vs.*

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State vs. Brown et al.

Boltraux, 31 Ann. 189. It is want of diligence on the part of the accused in not seasonably giving the sheriff, when he calls on him to do so, the locality at which the witness could have been found or served. 34 Ann. 73; 39 Ann. 674.

Facts and circumstances occur under the eye of the court which govern its discretion. 37 Ann. 128. It is the duty of the sheriff to show truly every effort he has made to secure a witness and to whom he has applied, if to defendant, that person's answers would materially aid the court in passing on defendant's diligence.

5. The fact that a witness was an accomplice may affect his credibility, but not his competency. 23 Ann. 78; 25 Ann. 522. As juries are the exclusive judges of the evidence in this State, it is plainly good law to charge them only as to the competency of the evidence, and not by a charge as to credibility trench on their functions.
6. There is no rule of law requiring the judge to charge the jury that the testimony of an accomplice needs confirmation; it is a rule of practice (25 Ann. 522) reaffirmed. *State vs. Russell*, 38 Ann. 138; *State vs. Mason*, 38 Ann. 476; *State vs. Crowley*, 32 Ann. 782.
7. Under the common law practice, the testimony of an accomplice is alone an unconfirmed, legally adequate, to sustain a verdict of guilty, should the jury believing him see fit to render it thereon. Bishop, 1 vol., C. P., section 1169. No statute of Louisiana abrogates this common law practice, hence it is the law of this State.
8. Where an accused on an appeal complains of a refusal of the trial judge to charge the jury that they ought not to convict on the uncorroborated testimony of an accomplice, the burden is on him to show, by the record, that there was no corroborating evidence of the testimony of an accomplice. The failure to show such a state of facts is fatal to his demand for reversal, as the court will presume that the jury convicted on sufficient competent evidence.

In short, he must show the applicability of the rule to his case, and failure to do so is presumptive that the court charged all the law applicable to the case. 38 Ann. 478.

9. The evidence of a conspirator of facts, which occurred while the conspiracy was on foot, is admissible. 35 Ann. 89; 37 Ann. 380; Bishop C. P. 228, 230. Again, the testimony of particular facts after the consummation made by one of the co-conspirators, as detailed by another in his presence, is admissible. Bishop C. P., vol. 2, section 228; Bishop. 1 C. P. 1248, 1249. There is a wide difference between the confession of a co-conspirator after the consummation of the crime and his evidence as to declarations of other conspirators of acts and declarations while the conspiracy is on foot before the end of the act.
10. A separation will not vitiate a verdict unless it be of such a character that prejudice to the party complaining may be expected to have resulted therefrom. The rule does not reach such temporary separations as may be reasonably anticipated, or must necessarily occur in the course of a protracted trial.

The fact that while the jury engaged in the trial of a capital case were deliberating upon their verdict two of the jurors retire from the room to obey a call of nature, is not such separation as would vitiate the verdict, when it appears that during such separation they were under the direct supervision of a deputy sheriff, and that they were not communicated with. *State vs. Turner*, 25 Ann. 573; 28 Ann. 657; *State vs. Johnson*, 30 Ann. 921.

John W. Jones and Wise & Herndon, for Defendants and Appellants.

The opinion of the Court was delivered by

POCHÉ, J. Henry Brown, the appellant, and several others were jointly indicted for conspiracy and murder. Before his trial, the case was continued as to one of the defendants, and a *nolle prosequi* en-

tered as to the others, confining the trial to Henry Brown alone, who was convicted of murder, and sentenced to death.

On appeal, his counsel complain of numerous errors to his prejudice, but the conclusion which we have reached as to one of those complaints obviates a discussion of all others.

In his general charge to the jury the trial judge instructed them as to the different verdicts which they could find, in the following language :

"In cases of this character there are three verdicts the law has provided may be found by the jury according to the law and the evidence of cases :

1. "Guilty. Death is the penalty to be pronounced upon such verdict.

2. "Guilty, without capital punishment.

"The penalty for such verdict is confinement at hard labor for life.

3. "Not guilty. Upon such verdict the defendant will be discharged without any punishment."

As the judge had been entirely silent throughout his whole charge on the subject of manslaughter, counsel for the defense requested him to give the following instructions to the jury : "There shall be no crime known under the name of murder in the second degree, but on trials for murder the jury may find the prisoner guilty of manslaughter," which is a literal copy of section 785 of the Revised Statutes of 1870, and of a section of act 130 of 1855.

The charge was refused by the judge on the ground, substantially, that the ruling invoked by the defense was inapplicable to the state of facts developed during the trial, which admitted of no mitigated verdict, but called absolutely for a verdict of "guilty," or "not guilty," and that to have given the charge requested would have been simply the enunciation of an abstract legal proposition which had no bearing upon the case on trial. And in an able and learned opinion he quotes in support of his conclusion a multitude of authorities, both from this and other courts of the country, from whose uniform rulings the principle has been formulated as follows :

"A judge not only may, but should, refuse to charge an abstract legal proposition, which has no bearing upon the case on trial, whether the proposition be correct or incorrect, or whether it be correct in part and incorrect in part." State vs. Daly, 37 Ann. 576.

But in his ruling, the judge confounded the rule of jurisprudence as established by the line of authorities which he invokes, with a rule of law emanating directly from the law-making power, made imperative

State vs. Brown et al.

in terms and in spirit on the courts of the State, applying directly to the case on trial, and unaffected by the state of facts as disclosed by the evidence, in the opinion of the trial judge. The laws' command is that the jury must be informed by the court that on trial for murder the jury may find the prisoner guilty of manslaughter, and the omission or the refusal to so inform them is a flagrant disobedience of the law, and is a fatal error.

In such cases the jury are the sole judges of the state of facts disclosed on the trial which may justify them to return a verdict of manslaughter, and the court is powerless to avoid their verdict, because in its opinion the evidence called for the finding of the higher offense. The verdict under the law would be responsive to the indictment, and it should stand, although it might be illogical, unjust or unjustifiable under the evidence.

Examples are not wanting of cases in which the jury have condemned some of the conspirators in a murder case for the highest offense charged, and the other conspirators for manslaughter only. Ford's case, 37 Ann. 443.

The question is not one of a proper charge under the test of the evidence on the trial, but one of compliance with an absolute mandate of the law.

Under the present state of our legislation, the jury have the option to find one of four verdicts, namely: "*Guilty*," "Guilty, without capital punishment," "Guilty of manslaughter," and "Not guilty." But under the effect of the charge as given to them in this case, they were restricted to only three; that of guilty of manslaughter having been completely eliminated from their consideration by the refusal of the judge to give them the instruction requested by counsel, and required by law.

The practical effect of his charge to the jury was to require them, in case they found Henry Brown guilty at all of the charge for which he was on trial, it was murder, and nothing else, a positive mandate of the law to the contrary notwithstanding.

A charge of similar import came under the consideration of this court in the case of State vs. Obregon, 10 Ann. 793, under an indictment of arson.

In that case the judge omitted to charge the jury that, "in all cases where the punishment demanded by law is death, it shall be lawful for the jury to qualify their verdict by adding thereto 'without capital punishment,' as required by the Statute of May, 1846, now embodied

as section 1000 in the Revised Statutes. Among other things, the court said :

"The upshot of the charge was, to impress the jury with the idea that if they found the prisoner guilty of arson at all, it was their duty not to qualify their verdict by adding the words without capital punishment. * * *

"Aside from the general tenor of the judge's charge in this instance, there was error in instructing that it was their duty to find an unqualified verdict, if the case was clear ; * * and the charge amounted to an instruction that, if a person was found guilty of arson he should always be punishable with death, overlooking the act of May 29, 1846, hereinabove quoted."

It must be noted that the case originated before the enactment of the statute of 1855, section 785 of the Revised Statutes, which we are now considering. In that case the judge merely omitted to charge the jury : while in the instant case he not only omitted but positively refused the charge, notwithstanding counsel's urgent request.

We have been at great pains to scrutinize our jurisprudence on this point, and to closely examine the large array of authorities relied on by the district judge in support of his conclusions herein, but we have been unable to find, and we apprehend that it is impossible for anyone to produce a single judgment of any American court of last resort, which upholds that the trial judge of a criminal court in refusing to charge to the jury a statute of the State, defining the duties and powers of the jury in reference to the verdict which they may render in the particular case on trial.

But, on the other hand, we find among the decisions quoted by our learned brother of the district court, a general current of thought decidedly to the reverse. Thus, in Patton's case, 12 Ann. 288, (quoted by him), we find the following :

"The prisoner pleaded not guilty to an indictment for murder. Upon the issue thus joined, the jury had power to find the prisoner guilty of manslaughter. (Rev. Stat. 136, sec. 2). It was, therefore, pertinent and right for the judge to instruct the jury on the law both of murder and manslaughter, although his counsel chose to assert that the only issue for the jury to try was the insanity of the accused." See also Stouderman's case, 6 Ann. 236 ; State vs. Ford, 30 Ann. 311.

We are thus forced to the conclusion that, under the rulings of the district court, the accused in this case has been denied one of the shields

State vs. Robinson.

of protection which the law extends to him, and that he is entitled to relief at our hands.

It is, therefore, ordered, adjudged and decreed, that the verdict of the jury in this case be set aside and avoided, that the judgment rendered thereon be annulled and reversed, and that the cause be remanded to the district court for further proceedings according to law and to the views herein expressed.

No. 230.

THE STATE OF LOUISIANA vs. CÆSAR ROBINSON.

When an accused person is charged in separate counts with burglary and larceny and he confesses himself "guilty as charged," it is competent for the judge to sentence him to one term of imprisonment for the commission of burglary, and to another term for the commission of the larceny—the latter to begin at the expiration of the former.

A PPEAL from the Tenth Judicial District, Parish of Red River.
Hall, J.

J. Henry Shepherd, District Attorney, and *J.O. Pugh*, District Attorney, for the State, Appellee:

1. A general verdict operates as a conviction upon all the well charged counts of an indictment. *Bish. Cr. Pr.*, sec. 1005; *Frazier vs. State*, 5 *Miss.*, 536; *People vs. Magallowa*, 15 *Cal.*, 496; 49 *Barb.*, 122.
2. Better practice is to make one sentence begin to run where the other ends. *Bish. Crim. Pr.*, sec. 1327, and authorities noted.
3. A general verdict upon an indictment charging burglary and larceny in separate counts will authorize a separate sentence on each count.

J. D. Roach and *S. A. Hall* for Defendant and Appellant.

The opinion of the Court was delivered by

WATKINS, J. The accused is charged in the indictment with burglary and larceny, in separate counts, and to the charge, in general terms, pleaded guilty. Thereupon the trial judge sentenced him to seven years' imprisonment for the commission of the burglary, and one year, in addition, for the commission of the larceny—the latter sentence to begin at the expiration of the former. From the judgment and sentence the accused appeals, and assigns as error that the judgment and sentence is contrary to law. The argument of his counsel is that, under a general verdict, rendered under an indictment containing several counts, the accused cannot be sentenced to cumulative punishments; that inasmuch as there has been but one conviction there cannot be more than one punishment; that the effect of such a rule would be to cumulate several punishments for one offense, and under a single finding.

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There is no statute on the subject, and the question has never been passed upon by this court, or its predecessors; hence the decision of it must rest on the principles of the common law.

On this subject Mr. Bishop formulates the following rule, viz:

"The courts hold, that, if a man in the night time breaks and enters a dwelling-house, intending to steal therein, and actually steals, he may be punished for two offenses or one, at the election of the power prosecuting him. If a single count of the indictment charges him with breaking, entering and stealing, they say his offense is single, being burglary committed in a particular manner; but, if the first count sets out, in the other form, the burglary as done by breaking and entering with intent to steal, then a second count may allege the larceny as a separate thing, and he may be convicted and sentenced for both." Vol. 1. Bishop's Crim. Pro., Sec. 1062 (fifth edition.)

The district attorney has drawn the bill under present consideration in conformity with the latter paragraph of the foregoing quotation; and it would seem to sanction the course pursued by the judge *quo* in the instant case.

Reference to the record shows that the accused in open court withdrew his plea of not guilty and pleaded "*guilty as charged*."

Now, inasmuch as he was charged with burglary and larceny, in separate counts, his plea of "*guilty*" extends to both; and as he confessed himself guilty of both, what good reason is there for saying that sentence for *both* could not be pronounced? There is none.

If it be permissible, under our law—and it assuredly is—for an accused person to be indicted as the defendant has been, it is equally permissible for the judge to sentence him accordingly upon conviction. R. S. Secs. 852; 1059.

In a certain sense separate counts are distinct indictments cumulated into one, in order that they may be tried by one jury. Oftentimes such offenses as may be thus cumulated for trial and sentence, are those that arise in a single transaction; and should the accused be separately indicted and tried, one trial might prove a bar to the other, and the ends of justice be, in part, defeated. Is it not equally clear that, if we should hold with defendant's counsel that but *one* punishment can be inflicted under such *dual* indictment, the ends of justice would be likewise defeated, and just to the same extent? We think so. What good purpose would be accomplished by thus permitting the cumulation of counts charging different offenses in one indictment, if but one punishment could be inflicted? None. This construction would defeat the law. We are of the opinion that the sentence and decree of the court are correct, and same are affirmed.

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No. 224.

THE STATE OF LOUISIANA VS. SOLOMON WILLIAMS, JR.

Under the provisions of Section 1056 R. S. on the trial on a charge of larceny, the jury, if the facts warrant it, can return a verdict against the defendant, "not guilty of larceny but guilty of embezzlement." Such a verdict is not in conflict with Articles 5 and 8 of the Constitution of 1879.

A PPEAL from the Eleventh District Court, Parish of Natchitoches.
Pierson, J.

J. Henry Shepherd, District Attorney for the State, Appellee :

1. Charges to the jury will not be reviewed by the Supreme Court unless they were in writing and the defendant excepted thereto at the time they were given. 34 Ann. 1213 ; 35 Ann. 543, 619, 770 ; 38 Ann. 497.
2. When an instruction to the jury appears misleading it it should be excepted to at the time, in order to give the court below an opportunity to correct the erroneous instruction or explain or qualify it, or make it more distinct. 35 Ann. 543 ; 37 Ann. 52.
3. For the purpose of interpretation all the parts of a statute are to be looked at together, and one part may control another. If possible they are to be reconciled. Bishop on Statutory Crimes, Sec. 64. Where the legislative meaning is plain there is not only no occasion for rules to aid the interpretation, but it is contrary to the rules to employ them. Sec. 72, Bishop on Statutory Crimes.
4. Section 1056, R. S., has received judicial interpretation in case of *State vs. Poland*, 33 Ann. 1161.

J. E. Breda and *M. H. Carver* for Defendant and Appellant.

The opinion of the Court was delivered by

McENERY, J. The accused was indicted by the Grand Jury of Natchitoches parish for the crime of larceny, "that Solomon Williams, Jr., late of the parish of Natchitoches, district and State aforesaid, on the 9th day of January, 1888, at and in the parish, district and State aforesaid, did feloniously steal, take and carry away, one beef of the cow kind, of the value of twenty dollars, the property of A. G. Lotcher." He was convicted of embezzlement; the jury, under R. S. 1056, returned into court a verdict as follows: "We, the jury, find the defendant not guilty of larceny as charged, but guilty of embezzlement," in direct response to the requirements of said section of the Revised Statutes.

Defendant's counsel contend that he was taken by surprise, as he was not informed of the nature of the charge against him in the indictment, and that the offense of which he was convicted was of a higher grade than the one with which he was charged.

The defendant was not taken by surprise, because he was bound to know the law, which informed him that on an indictment for larceny, if the facts proved warranted it, he could be found guilty of embezzlement. The statute under which the defendant was convicted is unambiguous.

State vs. Wingard.

"If it shall be proved that he took the property in question in any such manner as to be current in law to embezzlement, he should not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that such person is not guilty of larceny, but is guilty of embezzlement, and therefore such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such embezzlement. And no person so tried for embezzlement or larceny, as aforesaid, shall be liable to be afterwards prosecuted for larceny or embezzlement upon the same facts."

It was the intention of the law makers to destroy on the trial the nice technicalities that formerly distinguished the crimes of larceny and embezzlement, so that, as in this case, if the facts established the crime of embezzlement, the defendant could be convicted of that crime, and conversely, as enacted in the first part of the section, if indicted for embezzlement he could be convicted of larceny in the degrees mentioned in the section.

Defendant's counsel further allege that the statute is in direct conflict with Articles 5 and 8 of the Constitution of 1879. Article 5 provides that prosecutions shall be by indictment or information. This was by indictment. Article 8 provides that in all criminal prosecutions the accused shall enjoy the right to be informed of the nature and the cause of the accusation. He was informed of the nature of the accusation and the cause of the accusation, fully and specifically set forth in the indictment.

Judgment affirmed.

No. 225.

THE STATE OF LOUISIANA VS. PRIMUS WINGARD.

A writing of the following tenor: "Prime Wingard, 507 I. cot. T. T. P." is such in form as to be apparently of some legal efficacy, and may serve as a basis for a prosecution for forgery, uttering, etc.

In order to justify the admission of proof to show in what the forgery consists, it was unnecessary to make specific averment to that end in the indictment.

A PPEAL from the Second District Court, Parish of Bienville.
Boote, J.

J. Henry Shepherd, District Attorney for the State, Appellee:

1. In any indictment for forging, uttering, stealing, embezzling, destroying or concealing, or for obtaining by false pretenses any instrument, it shall be sufficient to describe such instrument by any name or designation by which the same may be usually known, or

State vs. Wingard.

- by the purport thereof, without setting out any copy or *fac simile* thereof, or otherwise describing the same, or the value thereof. R. S. Section 1049.
2. The essential elements of a forgery are: 1st. A writing in such a form as to be apparently of some legal efficacy. 2d. An evil intent of the sort deemed fraudulent in the mind of the defendant. 3d. A false making of such writing. Bishop, C. P., 400 Criminal Law, Vol. 2, Section 533.
 3. To constitute forgery it is not absolutely essential that the instrument uttered as true should be one so well executed that it would be likely to deceive a person of ordinary caution, nor the particular person intended to be defrauded. The true rule is, did the accused make or materially alter, with intent to defraud, any writing which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability. Bishop's Criminal Law 1, Section 572, page 352; Wharton's Criminal Law, page 338; State vs. Ferguson, 35 Ann. 1042; State vs. Ford, 38 Ann. 797.
 4. Proof of part of a charge of forgery is sufficient. A trifling variance between the proof and description are not deemed material. Waterman's Cr. D., p. 213, Sections 198-201. Especially where the substance and legal effect are the same. Bishop's C. P. 468, State vs. Given, 32 Ann. 782; 38 Ann. 799.

B. F. Edwards for Defendant and Appellant.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The defendant was convicted of forgery and sentenced to two years at hard labor.

He complains, on appeal, that the lower court erred in holding *that* the instrument alleged in the indictment is such as can be forged; that said instrument is complete and can be the basis of legal liability; and that, under the averments, evidence could be received explanatory of the instrument.

The indictment charges that the accused, on a day stated, in the parish named, did falsely and fraudulently forge and counterfeit a certain writing or paper of the tenor following, to-wit: Prime Wingard 507 I. cot. T. T. P., with intent to defraud C. W. Hanmer * * * and wilfully and feloniously did offer, utter and dispose of, put off and publish as true, a certain false, forged and counterfeited writing, or paper, of the tenor following, to-wit: (as above), with intent to defraud C. W. Hanmer, he, the said Primus Wingard, at the said time, he so uttered and published the said last mentioned false, forged and counterfeit writing, or paper, a person well knowing the same to be false, forged and counterfeited, contrary, etc.

I.

One of the three essential elements of forgery to be charged against a defendant, is that what is averred to have been forged, etc., be a writing in such form as to be apparently of some legal efficacy. Bishop Cr. Pr., Sec. 572, p. 352; Wharton Cr. L., 338; 35 Ann. 1042; 38 Ann. 797.

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On a germane question, this Court recently held that, certain papers reading: "Willy Johns has picked 215 pounds of cotton (signed) Henry Heastly," and "David Jefferson has picked 852 pounds of cotton (signed) Henry Wooten," were writings of some legal efficacy, which could serve as the basis for a prosecution.

It said: "The law does not require, in cases of forgery, that the instrument charged to have been forged shall on its face purport to be an order for the payment of money or delivery of goods. It is sufficient that the instrument be one by the use of which money or goods can be obtained," and the Court referred to a New York case, 5 Johns, 236, in which it has been held that an instrument reading: "Due F. F., one dollar, on settlement this day," is one which can be treated as a note for the payment of money. 39 Ann. 331.

The district court ruled that the indictment contains the essential elements to support the charge.

It is evident that the paper mentioned in the indictment is in a form which apparently has some legal efficacy, and that upon it money could have been obtained, as, in fact, it was in this case. The court ruled correctly.

II.

The second objection is that the writing or instrument in question is incomplete on its face, so that, as it stands, it cannot be the basis of any legal liability.

This objection may be considered as involved in the first, and the ruling just made disposes of it.

III.

The third objection is that the indictment contains no allegation explanatory of the alleged forged instrument or writing, and hence evidence cannot be received to that effect.

The testimony offered was indispensable to establish how the alleged forgery had been committed. Indeed, it is impossible to conceive how the jury could have concluded that the paper had or not been forged, unless proof had been adduced to show what the paper was, and in what manner it was originally drawn up.

It was unnecessary to aver in the indictment how the paper had been tampered with and forged.

Forgery may consist in making and issuing with fraudulent intent, etc., a paper or writing false or forged, either in its entirety or in some significant or important portion or part of it.

In the instant case, it was not pretended that the whole writing had

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been forged, but simply that one of the figures in the number had been forged, by changing it from 1 to 5, so as to make the number to be 507 instead of 107.

By the alteration the party named would have been entitled to receive a larger sum than he would, had not the writing been tampered with.

It was legitimate to receive evidence under the circumstances, and the lower court did not err in admitting it.

IV.

The motion in arrest is based on the grounds set forth in the first bill just passed upon. The second bill is to the overruling of the motion in arrest. The views above expressed justify the action of the trial judge on the motion in arrest, and dispose of the second bill.

Judgment affirmed.

No. 229.

THE STATE OF LOUISIANA VS. ADOLPHUS BANKS ET AL.

If, in a criminal case, it appears from the whole tenor of the proceedings, that an indictment against several persons therein charged jointly with an offense, properly endorsed as against "A and als" was presented in open court by the grand jury, the fact that, in his minutes of the day the clerk erroneously copied the title so as to make it read as against "A" only, cannot vitiate the proceedings.

When conspiracy has once been proved, in the opinion of the trial judge, evidence of the acts and declarations of one of the conspirators in the prosecution of the common design is admissible against all others. Affirming State vs. Ford, 37, Ann. 443.

An accomplice jointly accused with other persons, but not on trial and discharged under a *nolle prosequi*, is a legal or competent witness; the fact of his being an accomplice can affect only his credibility, of which the jury are the sole judges. Hence the trial judge cannot be required to instruct the jury to discredit his testimony unless corroborated by unimpeached evidence.

Nor can the judge be required to give as a charge the legal maxim *falsus in uno, falsus in omnibus*.

A PPEAL from the Sixteenth District Court, Parish of East Feliciana. *Brame, J.*

J. Henry Shepherd, District Attorney, for the State, of Appellee:

1. The accused has no right to exact a list of the State witnesses to be produced before the petit jury, nor can the Court require the district attorney to furnish such a list as a condition precedent to a trial of the cause. 32 Ann., 782. State ex rel. Wickliffe, 39 Ann., 847.
2. The fact that a witness was an accomplice may affect his credibility, but not his competency. 23 Ann., 78; 25 Ann., 582. In the last case the law plainly stated that a jury may convict on the uncorroborated testimony of an accomplice. There is no rule of law requiring the judge to charge the jury that the testimony of an accomplice needs

40 736
47 484
47 502
40 736
52 1930
40 736
107 304

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confirmation; it is a rule of practice. 25 Ann., 522, reaffirmed in State vs. Russell, 33 Ann., 138; State vs. Mason, 38 Ann., 476; State vs. Crewley, 32 Ann., 792. Bishop 1 vol. C. P., 1169.

3. When one or more persons are acting in concert with the defendant about the particular thing in question, all with a common object, the declaration of any one of the others during the time of the transaction, whether present or absent, may be given in evidence against the defendant. Bishop, C. P., Vol. 1, 1248; 35 Ann., 89; 37 Ann., 460.
4. In accord with the current of the combined adjudications in reason and as general doctrine the declarations of the deceased or of any other third person who participated in the transaction, which ended in death, when either they or some fact, which they tend to explain, may be deemed a part of such transaction * * * provided that either the declaration or the fact it would illustrate is pertinent to the main inquiry. Bishop, C. P., 625. See note 2, also 1086 same.
5. Corroborating circumstances, if attainable, should always be offered in proof of the evidence of an accomplice, and courts should favor the admission of such corroborating evidence, Bish. C. P., 1150, 1162, 1169, 1170.
6. The maxim *factus in uno factus in omnibus* is a maxim, not of law, but of sound sense, and it is to be applied or not by the jury according to their own understanding of the truth of the individual case. Bishop, C. P., 1149.

I. D. Wall and Chas. Kilbourne, for Defendants and Appellants.

The opinion of the Court was delivered by

POCHÉ, J. In this case, in which Adolphus Banks, Louis Edwards, Edmond Drennels, and Prudy Williams had been indicted for conspiracy and murder, a *nolle prosequi* was entered as to Banks, who was afterwards used as a State witness, and the trial resulted in the acquittal of Prudy Williams, and in the conviction of murder, by an unqualified verdict, of Edmond Drennels, and in the conviction of Louis Edwards for murder without capital punishment.

The two convicted defendants prosecute this appeal and urge numerous complaints for our examination.

1st. They contend that the minutes of the court fail to show that an indictment was presented against them in open court, because the entry in the minutes on the subject refers to an indictment against *Adolphus Banks only*.

But the record shows that the indictment, which was presented on that day, was entitled: "*State of Louisiana vs. Adolphus Banks et als.*," and the indictment itself charges all four of the persons hereinabove enumerated with the crime of murder and conspiracy. This and other errors in the general confection of the transcript may go a great way to prove gross negligence or glaring incompetency on the part of the clerk, but they cannot vitiate the proceedings, from the whole tenor of which it appears to our entire satisfaction that an indictment was duly presented against the two defendants who are now

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appellants before us, and that their complaint in this particular is groundless.

2d. The next complaint involves the ruling of the trial judge in admitting as evidence the statement by the State witness, Adolphus Banks, that Louis Edwards had told him where he had procured the ax with which the homicide had been committed.

In the opinion of the judge the conspiracy for the perpetration of the murder had been proved against the two appellants, and it appeared that the statement had been made at the time and place of the homicide, hence it follows that the declaration of one of the conspirators in connection with the common purpose must be held as that of all the others, and it was therefore admissible as evidence against them all.

In Ford's case, 37 Ann. 443, this court, guided by undisputed authority, formulated the rule as follows: "When conspiracy has once been proved, in the opinion of the trial judge, evidence of the acts and declarations of one of the conspirators in the prosecution of the common design, is admissible against all the others." Wharton's Criminal Evidence, Secs. 698, 701; United States vs. Goodwin, 12 Wharton, 469. We therefore uphold the trial judge in the ruling complained of.

3d. It is next charged as error on the part of the judge to have admitted the testimony of a witness to the effect that Banks had shown him the place where the homicide had been committed, and the spot where the body of the victim had been found. The evidence was properly admitted to corroborate the testimony of Banks who had already testified. There is no force in the contention that the facts disclosed by that evidence were *res inter alios acta*, as it appears that, at the time, Banks was one of the accused in the case. The objection that the State could not corroborate her testimony before it was attacked finds no sanction in law or reason. The parties to a suit can not be controlled in the order of introducing this evidence. It was not only competent for the district attorney to seek, at any stage of the trial, to corroborate the testimony of an accomplice who had turned State's evidence, but it was his duty to do so, in compliance with well settled jurisprudence, and in justice to the accused themselves, whose counsel were zealous in their efforts to prevent a conviction on the uncorroborated testimony of an accomplice, and this was the subject of their fourth bill of exception, in which they complain of the refusal of the judge to charge the jury to give no faith to the statements of the accomplice implicating other persons but himself, unless he was therein corroborated by unimpeached evidence.

State vs. Dorsey.

The judge very properly refused the charge as requested, because it was unwarranted by the laws of this State; and because in his general charge to the jury, he had covered the whole ground in a manner fully sanctioned by criminal jurisprudence in this State as well as in other commonwealths of the American Union. He had charged as follows: "The fact that a witness was an accomplice may affect his credibility but not his competency, that is, he is a legal witness, and you must determine what credit you think his testimony is entitled to, whether corroborated or uncorroborated."

In these few clear and terse utterances, the judge successfully announced the whole doctrine as established in jurisprudence, and complied at the same time with the rule of law which places the solution of the facts in a criminal prosecution within the exclusive province of the jury. Bishop, C. P., 1160, 1169. State vs. Mason, 39 Ann. 476; State vs. Prudhomme, 25 Ann. 522; State vs. Bayonne, 23 Ann. 78. Proffatt on Jury Trials, § 365.

5th. From the foregoing considerations we conclude that the trial judge was equally correct in refusing the charge requested by counsel for the defense embodying the legal maxim "*falsus in uno, falsus in omnibus*," which is the subject of their fifth bill of exception, and which was likewise intended to affect the testimony of the accomplice, Banks. As the jury were the sole judges of the credibility of the witness, it was their right, untrammelled by any direction, check or restraint on the part of the court, to adopt their own rules or modes of testing the credit to which the witness was entitled to, and of weighing the value of his testimony. Bishop, C. P., 1149; Wharton's Criminal Evidence, § 380; Waterman's Criminal Digest, p. 130 No. 34.

After a thorough examination and minute consideration of all the grounds of error urged by these appellants, we reach the conclusion that they have had a fair and impartial trial, and that they are entitled to no relief at our hands.

Judgment affirmed.

No. 237.

THE STATE OF LOUISIANA VS. GILBERT DORSEY.

An objection to the effect that the names of persons who are summoned as tales jurors were not written on ballots and placed in the venire box and drawn therefrom, but that same were called from a list that was made out and furnished to the counsel by the sheriff, will not prevail in case it appears that the entire list was exhausted before the panel was completed.

40	739
45	980
45	1144
40	739
49	1150
40	739
50	1843
40	739
52	1829
40	739
107	48
107	455
40	739
113	479
114	89
40	739
116	88
40	739
119	569
40	739
124	95

State vs. Dorsey.

The expression of opinion which disqualifies a juror is a *fixed, deliberate and determined* one, and which will not yield to evidence.

It is not proper for the trial judge to charge that, if one witness swears positively to the occurrence of a certain fact, and other witnesses, who had equal facilities of witnessing it, swear that, if same had occurred they would have seen it, the latter must prevail. It is necessary that the court should charge, in addition, that such witnesses *exercised* such facilities and testified that no such occurrence happened, in order that their evidence should preponderate.

An objection that a juror held a whispered conversation with a person not connected with the court, and in the presence of the judge and the defendant's counsel, cannot avail the accused as a disqualification of the juror. He had the opportunity of requesting the judge to discharge the jury, and did not, and his complaint comes too late, after he has enjoyed the opportunity of an acquittal.

As a rule it is safer to exclude spirituous liquors *entirely* from the use of the jury in a capital case, yet if the proof shows that no injurious consequences followed from its use, no ground is furnished for the allowance of a new trial.

A motion in arrest of judgment should concisely state the defects complained of as being patent upon the face of the record.

A PPEAL from the Sixth District Court, Parish of Morehouse.
Vaughan, J.

J. P. Madison, District Attorney, and *J. Henry Shepherd*, for the State, Appellee.

Todd & Todd and *Robert Whetstone* for Defendant and Appellant.

The opinion of the Court was delivered by

WATKINS, J. This appeal is prosecuted from a verdict convicting the accused of murder, and a sentence to life imprisonment. His counsel urge various complaints against the rulings of the trial judge, and charge that same were prejudicial to him, and that he has not had a fair trial. We shall deal with them in the order of their occurrence.

I.

During the process of empaneling the jury the regular *venire* was exhausted before same was completed, and the court ordered the sheriff to summon six tales jurors to complete the panel.

The sheriff, having summoned said talesmen, returned into court a list of their names, and from which list the call was proceeded with in regular order, commencing with the first. Objection was urged to this procedure by the defendant's counsel on the ground that the names of the tales jurors should have been deposited in the *venire* box and drawn therefrom. Appended to the bill of exceptions is a statement of the trial judge to the effect that the list of jurors summoned was exhausted before the panel was completed. We have decided that in such event the accused suffers no injury, and that such an objection is not good. 35 Ann. 315, *State vs. Farrar*.

II.

One of the jurors having been sworn on his *voir dire* stated that he had formed and expressed an opinion relative to the guilt or innocence of the accused, that same was a fixed opinion, but that he would be governed by the evidence. Thereupon defendant's counsel tendered a challenge for cause, and it was disallowed by the court. The judge assigns that the juror stated that he would disregard his opinion and be governed by the evidence;

If the opinion which the juror entertained was of such a character that it would yield to the evidence adduced on the trial, it cannot avail as an objection to his competency. For it has been decided by this Court that "the expression of an opinion which disqualifies a juror is a fixed, deliberate and determined one, which cannot be changed." 35 Ann. 317, State vs. Farrar.

The opinion of the juror in question may be said to have been a fixed or decided opinion, but not an *unyielding and determined* one. It is not pretended—judging by the recitals of the defendant's bill of exception—that the opinion of the juror was formed from hearing the witnesses' testimony, or statements, and it must, therefore, have been founded upon rumor, and could not have been a determined opinion, such as would be disqualifying.

Furthermore, it does not appear that the particular juror in question sat upon the jury of trial, or that the defendant's peremptory challenges had been already exhausted when the objection was urged. 35 Ann. 315, State vs. Farrar.

III.

On the conclusion of the trial the defendant's counsel requested the court to charge the jury that, where one witness swears positively to a fact, and other witnesses, who were present and had equal facilities of seeing the transaction, swear that if the same had occurred they would have seen it, the testimony of the latter is entitled to equal weight as that of the former, and should have as much force. This charge was declined by the judge.

The counsel admit the force of the rule that, when one witness swears positively to a certain fact and other witnesses swear that they did not see the occurrence, the testimony of the former will be considered as outweighing that of the latter. The reason for the rule undoubtedly is that the one is *positive* and the other *negative* testimony. But they insist that we have recently announced a doctrine that is

State vs. Dorsey.

compatible with their theory, and not at all inconsistent with the rule just stated, and they cite our opinion in *State vs. Chevalier*, 36 Ann. 84.

In that case we employed this language, viz: "The rule is that where one witness swears positively that he saw and heard a fact, and another, who was present, merely swears that he did not see it, and the witnesses were equally faith-worthy, the general principles would, in ordinary cases, create a preponderance in favor of the affirmative, when the positive can be reconciled with the negative without violence or constraint.

"Evidence of a negative character may, under particular circumstances, not only be equal but superior to positive evidence. This must always depend upon the question: Whether the negative testimony can be attributed to inattention, error or defect of memory, and whether the witnesses had equal means and opportunities for ascertaining the facts to which they testify, *and exercised the same?*" (The italics are those of the writer.)

Conceding the force of the rule and the foregoing qualification, taken together, and the requested charge was not a permissible one, because it was not formulated within its compass and pursuant to its provisions. Defendant's counsel simply requested the court to charge that, if one witness swears positively to the occurrence of a certain fact, and other witnesses, who had equal facilities of witnessing it, state that if same had occurred they would have seen it. This was not sufficient. They should also have stated further, that such witnesses *exercised* such facilities, and testified that no such occurrence took place. For it does not suffice that they had the opportunity to see, but did not; that they were present, but did not have their attention attracted to it. These are merely negative averments, and such evidence is negative, and does not preponderate over, and is not entitled to equal weight with the positive testimony of a single witness. The mere fact of persons being present upon the happening of a transaction, and having an opportunity to witness it, and who, thereupon, state that if such a transaction had occurred they would have seen it, is not equivalent to saying that they exercised the opportunity presented and that no such an occurrence transpired. The charge requested was an improper one.

IV.

An application for a new trial was made on the grounds, viz:

First—That while the trial was in progress, and after some of the jurors had been sworn, one of them held a whispered conversation

State vs. Dorsey.

with a person not connected with the court, and with whom he had no right to converse.

Second—The jury were allowed to indulge in spirituous liquors “during the trial of the case.”

The motion was refused, and defendants reserved a bill of exceptions.

1. On the trial of the motion it was stated by the deputy sheriff, as a witness for the accused, that he saw a person, not connected with the court, engaged in a whispered conversation with one of the jurors who had been sworn, and that he ordered him away immediately. This occurred while the juror was sitting in the jury-box, and in the presence of the court.

From this statement it does not appear that the juror was guilty of any improper conduct. He did not invite the conversation, nor participate in it. This occurrence took place in the immediate presence of the court. It was admitted by one of defendant's counsel, in the course of the argument here, that he observed it at the time it happened, and that he made no objection to the court, and did not, on that account, request that the jury be discharged. It is quite firmly settled that an objection to the qualification of a juror must be taken advantage of seasonably to be of avail to the accused, and this rule may be wisely extended to an objection to the conduct of a juror in this regard. The counsel had an opportunity of tendering a seasonable objection to further proceeding with the trial, before that jury, and did not; consequently, his complaint comes with indifferent grace after he has taken the chance of an acquittal by the jury as constituted.

2. On the other branch of the motion the same witness testified that he asked the judge if there was any impropriety in giving the jurors a *drink* of whisky, as they said they were tired, and wanted it and he replied there was none.

He states, further, viz: “I had deputy sheriff, Taylor, to take a pint bottle of whisky to their room. The judge told me not to let them have enough to become intoxicated. The one pint is all that I know of.”

Was this a misdirection, or misdiscretion of the trial judge? It does not appear from the motion or the evidence adduced on the trial thereof that this occurrence happened *after* the trial and *during the deliberations* of the jury upon their verdict; but, we understand that it is specifically laid “during the trial of the case.”

It was undoubtedly the duty of the judge to see to it that the com-

State vs. Hoyer.

fort of the jurors was provided for, as well as their subsistence. In this instance the representation was made to him that the members of the jury had said they were tired and wanted a drink of whisky, and then only a pint was furnished them. Our predecessors have, under exceptional circumstances, permitted liquors to be furnished to the jury *during a trial* that was protracted. State vs. Canfield, 23 Ann. 148.

In that case it was justly observed by the court that "though we would be far from encouraging the practice in jurymen of taking an enemy into their months to steal away their brains, yet we must recognize the fact that alcohol has its use in case of exhaustion and illness."

That sentiment is particularly applicable here.

In that case, as in this, the whisky was furnished to the jury *during* the trial. The court say: "It does not appear that any liquors were furnished to the jury *after* they retired to consider their verdict." The court declined to grant a new trial.

While it is true, as stated in *State vs. Brunetto*, 13 Ann. 45, that "the safer rule is to exclude spirituous liquors entirely from the use of the jury in capital cases, and so I understand the current of decisions to tend," yet, in this particular instance, *no apparent injurious consequences flowed from the use of the modicum of whisky that was supplied during the progress of the trial*, and it furnishes no ground to disturb the judge's ruling.

V.

The motion in arrest of judgment is altogether without merit, because it *mentions* no defect of any kind that is patent on the face of the record.

Judgment affirmed.

No. 231.

THE STATE OF LOUISIANA VS. ROBERT HOYER.

A description in an indictment for larceny of the property stolen, as "some bottled beer, of the value of two dollars and fifty cents," is insufficient, and being a matter of substance, a motion in arrest of judgment will be sustained.

A PPEAL from the First District Court, Parish of Caddo.
Hicks, J.

J. Henry Shepherd, District Attorney, for the State, Appellee:

The tendency of modern jurisprudence is to relax the strict technical rules of the common law and look rather to substance than forms, to ideas rather than words. 32 Ann. 335.

State vs. Adam.

"The object to be gained by the description of the stolen things, namely, to individualize transaction, will indicate how definite it should be." It is to enable the court to see from it that the things are in law subjects of larceny. Bishop C. P. 782.

Goods charged to have been stolen must be described with certainty to a common intent—that is with such certainty as will enable a jury to say that the goods proved to have been stolen are the same as those charged in the indictment. Waterman, C. D., p. 387, section 186.

Land & Land, for the Defendant and Appellant.

The opinion of the Court was delivered by

MCENERY, J. The indictment against defendant charges him with having, on the 24th day of December, 1887, in the parish of Caddo, feloniously stolen "some bottled beer, valued at two dollars and fifty cents, the property of Bovida & Jurgler." This is all the description and designation of the stolen property. It is insufficient. A minute and detailed description of the property stolen is not required, but there must be such a description, numerically and specifically, as to individualize the property with legal certainty so that the jury can determine whether the property proved to have been stolen is the same as that described in the indictment, thus enabling the defendant, in case of acquittal or conviction, to plead the same to a subsequent indictment relating to the same property.

The defect in the indictment being one of substance, the motion in arrest of judgment was properly sustained. 10 Ann. 30; 30 Ann., p. 1242; 21 Ann. p. 442.

Judgment affirmed.

No. 232.

THE STATE OF LOUISIANA VS. JOSEPH ADAM.

The State attorney is the representative of the public and the legal adviser of the grand jury, who have a right to call upon him for advice on questions of law and procedure. Although he has no right to influence or direct them in their finding, or express any opinion on questions of fact, he may assist them in their labors. Surely, his telling witnesses to state to the jury all they know, is no improper interference.

The constitutional provision which guarantees to an accused the right to compulsory process is not a dead-letter, and must be enforced.

Under a proper showing for a continuance, on the ground of the absence of a material witness, the trial must be postponed.

Sufficient assistance must be afforded an accused to procure his witnesses. When it does not clearly appear that such was given him in a capital case, the accused is entitled to the benefit of the doubt.

A PPEAL from the Twenty-first District Court, Parish of St. Martin. *Mouton, J.*

40	745
107	626
40	745
116	401

State vs. Adam.

J. Henry Shepherd, District Attorney, for the State, Appellee.
Edward Simon for Defendant and Appellant.

The opinion of the Court was delivered by

BERMUDEZ, C. J., On a conviction of murder, without capital punishment, the defendant was sentenced for life, to hard labor.

On appeal, he complains that the lower court erred, 1st. in overruling his motion to quash; 2d, in refusing an application for a continuance, and, 3d, in allowing certain testimony.

I.

The motion to quash rests upon the ground that the district attorney was present before the grand jury during a part of the examination of the witnesses.

Conceding that a motion to quash can be predicated on such ground, there is nothing to show that the district attorney was present at their deliberations, took any part therein, or influenced or directed them in their finding. It appears that he merely told one or two of the witnesses to state to the grand jury what they knew about the case.

The district attorney is the representative of the public and the legal adviser of the grand jury. They have a right to call upon him for assistance as to the mode of proceeding and on questions of law, although it is undeniable that it would be unlawful for him to participate in their counsel and express opinions on questions of fact. It would not be illegitimate for him to assist them in the examination of witnesses, so as to elicit from them the material or essential facts on which the prosecution necessarily rests.

The custom is one of long standing. It prevails in other sister States, and, as a conservative measure, it should not be interfered with in the absence of express legislative prohibition. Bishop on Cr. Pr. par. 861, 696; Davis' Prac. 18-26.

II.

The second ground of complaint will now be considered.

The application rests on the fact of the absence; on the day of trial, of an alleged material witness, residing in another parish, ordered to be summoned, and concerning whom no return had been made.

It appears that some seven days before that fixed for the trial, the defendant offered a petition, verified by his oath, setting forth material facts expected to be proved by a witness residing in an adjoining parish, praying that he be summoned to testify.

On the day fixed for the trial the witness' name was called, but the witness did not answer. The sheriff of the parish of the residence, to whom the subpoena had been directed, had made no return.

Thereupon the defendant moved for a continuance, based on his *affidavit*, which establishes the material facts which he expected to prove by the absent witness, which, if proved, might have supported a case of self defence; next, due diligence; further, his inability to prove the same facts by any other *known* witness, and, last, that the summons which had been regularly issued to, had not been returned by, the sheriff of the parish of the residence of said witness.

The District Court overruled the motion, substantially, on the grounds: *that* the accused had not given proper directions as to the whereabouts of the witness, averring only that he is informed that he is on the Hope plantation in Iberia; *that* it is to the knowledge of the court that said witness is not there, and that he is absent from and beyond the process of the court; *that* the defendant has not shown the due diligence required by law, particularly when more than ordinary opportunity had been given; *that* the defendant does not swear that the facts alleged as material cannot be proved by any other witness, but, simply that he knows of none, when it appears in the record of this case that several other witnesses, summoned by him on preliminary examination, have testified to identically the same facts; *that* it is evident, from all the circumstances, that delay is the object of the motion; *that* no showing is made to induce the belief that the attendance of the witness at a future day can be procured, and that the witness may never more be seen.

It will suffice to say that the accused gave the only direction possible, under the circumstances, when he stated the name of the plantation on which he had been informed that the witness resided; that the knowledge which the court claimed to have, that the witness was not at that place, but is beyond the process of the court, is not defined, and may have been acquired on some misinformation, not stated, which the accused had no opportunity to contradict; that this knowledge is not such in itself, under the circumstances, as can overthrow the presumption of verity which attaches to defendant's *affidavit*; that it is not perceived in what respect the accused could have shown more diligence; that it was sufficient for the accused to swear that he knew of no other witness who could prove the same facts; that the right of the trial judge to question the truthfulness of the *affidavit* of the accused in the manner attempted, is more than doubtful; that if, as stated, other witnesses at the preliminary examination had testified to the same purport, it is not impossible that such witnesses may have since died or disappeared for parts unknown; *that* there is nothing to show that the object of the defendant was to obtain further delay, and

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that his expectation to procure the attendance of the witness, at any subsequent time, is sufficiently established.

It may be added, that it is at least a possibility that the sheriff of the parish of the residence of the witness, to whom the subpoena had been issued, had served it and had not had time to make a return, or had not done so for some good reason. The accused was entitled to know of such return, and in the absence thereof, could not be driven to a trial.

The constitutional guarantee to an accused of a right to compulsory process for the attendance of his witnesses, is not to be trifled with. It is not a dead-letter, and must be enforced.

Considering, as we do, that the defendant was entitled to a continuance to procure the attendance of the witness, and that, if the facts stated in the *affidavit* had been established by him, it is plausible to conjecture that the jury, in the absence of outbalancing evidence, might have returned a different verdict, we apprehend that the accused has not had the fair and impartial trial to which he is by law entitled, and that it is our duty to extend the relief sought.

It is settled that where it is doubtful that an accused, charged with a capital offence, was afforded sufficient assistance to procure his witnesses, he is entitled to the benefit of such doubt. *State vs. Boitreaux*, 31 Ann. 188.

There is no necessity for expressing an opinion on the third ground of complaint.

III.

It is, therefore, ordered and decreed that the verdict of the jury and the judgment and sentence upon it be annulled and reversed, and that this case be remanded to the lower court for further proceedings, according to law.

No. 233.

THE STATE OF LOUISIANA VS. PAT PATE.

Under the provisions of Section 1934 of the Revised Statutes of 1870 a district judge has the discretionary power to adjourn, by a written order to the sheriff, a regular term of the court, to any day preceding the next regular session, as he thinks proper; and to require the attendance of jurors accordingly.

Under the effect of such an order the first day of the actual session becomes the first day of the regular jury term for that month, within the contemplation of Section 6 of Act 44 of 1877, requiring that the Grand Jury be drawn on the first day of the regular term.

A Grand Jury thus drawn is a legal body, and a motion to quash an indictment presented by that body, on the ground of illegality in the organization thereof, cannot prevail.

State vs. Pate.

A PPEAL from the Tenth District Court, Parish of De Soto.
Hall, J.

J. Henry Shepherd, District Attorney, and *J. O. Pugh*, District Attorney, for the State, Appellee.

E. W. Sutherlin, *C. M. Pegues* and *J. B. Lee*, for Defendant and Appellant.

The opinion of the Court was delivered by

POCHE, J. This appeal, which was taken from a conviction of manslaughter under an indictment for murder, presents but one point for review.

Before trial the accused moved to quash the indictment on the ground that the Grand Jury which had presented it had not been legally organized.

The alleged illegality is drawn from the following incident: On the 3d day of February, 1888, the judge issued a written order to adjourn the regular term of the court, which had been fixed according to law for the first Monday, to the second Monday of that month, and to require the attendance of the jurors drawn for that term, in accordance with the adjourned session of the court.

The term was held in pursuance of the adjournment, and the Grand Jury was organized on the first day of the session, which begun on the 13th, which was the second Monday of February.

The contention is that the order of adjournment was illegal, because it was issued without sufficient or legal reason, and that in consequence thereof the Grand Jury was not empanelled on the first day of the term, and was not drawn from a *venire* of jurors serving for the week for which they had been drawn, as required by law.

The judge relies, as authority for his action in the premises, on Section 1934 of the Revised Statutes, which reads as follows:

"In case the judge should not appear on the first day of any term, the sheriff, or in the event of his sickness, death, resignation, absence, inability or failure to act, the coroner, shall adjourn the court from day to day for not more than three days. The judge may also, by written order directed to the sheriff, adjourn the court to such day preceding the next regular session as he may think proper."

But defendant's counsel argues that under a proper construction of both paragraphs taken together, the written order of adjournment by the judge must be justified by a reason expressed in the order, or subsequently given when called for.

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The argument finds no sanction in the words of the Statute. The first clause contemplates an adjournment *by the sheriff* in the absence of, and without any order from, the judge, the absence of the latter being the reason for the adjournment. The second clause provides for an adjournment of the term by means of a written order emanating from *the judge*, whether present or absent, at his discretion, and without being required to give any reasons. Barring the limit to the adjourned term, which must be to a day preceding the next regular session, the discretion which the law vests in the judge is unqualified, and no interference with its exercise can be tolerated on the part of litigants by way of pleading.

Abuse of such power by a judge must be remedied by other modes, for which adequate provisions are afforded by the Constitution and laws of the State.

As the order was sanctioned by law, it had its legal effects, one of which was to legalize the session of the court which begun on the 2nd Monday of the month.

The first day of that session was the first day of the February term within the scope and requirement of Section 6 of Act No. 44 of 1877, which provides that the Grand Jury must be drawn and organized on the first day of the regular jury term of the court.

This conclusion is not only sanctioned by the text of the law, but it is fully warranted by authority.

In Bringer's case, 14 Ann. 461, this Court, in dealing with a germane question, held:

"The court was not in session the first and second weeks. These jurors did not serve, or even attend court during that time; and the district judge properly held that, in contemplation of law, the first week of the actual session of court was that during which the jurors first enlisted had to attend court and serve in that capacity."

The foregoing considerations lead to the logical conclusion that the Grand Jury which returned the indictment under which appellant was tried was a legally organized body, and that the district judge committed no error in overruling his motion to quash the bill.

Other points were made below, but are not pressed on appeal, and hence they are considered as abandoned.

Judgment affirmed.

 State vs. Wilson.

No. 222.

THE STATE OF LOUISIANA VS. ELBERT WILSON.

It is not misconduct on the part of a jury to procure and read law-books *after* they have concluded their deliberations, and decided upon their verdict, although it has not been formally rendered in open court.

Because inartificial expressions and words are employed in framing a verdict by the jury, the same will not be annulled and set aside, if same are sufficient in terms to reasonably convey the idea intended.

The rule *idem sonans* is applicable.

A PPEAL from the Third District Court, Parish of Lincoln.
Barksdale, J.

J. Henry Shepherd, District Attorney, for the State, Appellee:

1. There is no law requiring verdicts to be in writing. 8 R., 31 Ann. 96; 32 Ann. 854; 33 Ann. 1414.
2. The law does not require jurors to be philologists. All that law requires is their ability to appreciate the facts and to apply the law. When they have done that and expressed their sense in an intelligible and unequivocal form the law is satisfied. 31 Ann. 96; 32 Ann. 854; 33 Ann. 855.
3. A written verdict badly spelled, which would otherwise leave its true meaning in doubt, has all its doubts removed, and is controlled by the language used by the clerk when reading the said verdict in the presence of the jury, and is conclusive of what the true verdict is, and that it is in accordance with, and fully supports, the sentence. 32 Ann. 854; 33 Ann. 1414.
4. A verdict will not be set aside because there are law-books in the room in which the jury retired to deliberate, where there is no proof that the books were read and examined by the jury. *State vs. Farmer*, 38 Ann. 309; 23 Ann. 678.
5. It is not essential to embody in the verdict the name of the accused or to insert the offense charged. *State vs. Tanek*, 30 Ann. 832; 31 Ann. 717; 34 Ann. 370.

E. E. Kidd, for Defendant and Appellant.

The opinion of the Court was delivered by

WATKINS, J. The indictment charges that the defendant did "feloniously and of his malice aforethought, with a dangerous weapon, to wit, a pistol, shoot J. W. Davis, with intent to kill and murder him."

Having been tried, convicted and sentenced to imprisonment in the penitentiary, he has appealed, and rests his claim to relief on two bills of exception, a motion in arrest of judgment, and an assignment of error in this Court.

I.

After conviction the accused claimed a new trial on the ground that the jury had been guilty of misconduct, to his prejudice, in this, viz: that "during their deliberations upon their verdict" they obtained and examined a law-book and consulted the same with reference to the

State vs. Wilson.

case, and that this misconduct on their part vitiates the verdict. Annexed to the defendant's bill, and brought up with it, is the testimony of the deputy sheriff, who states that the jury had a law-book in their hands prior to bringing in their verdict, but he did not know whether they examined it or not.

He further states that this was *subsequent* to their having been charged by the court, and, also, *subsequent* to the time when they had informed him that they had found a verdict, and requested him to inform the court.

If the jury had already *concluded* their deliberations and decided upon the verdict they were to render to the court, their examination of a law-book *subsequently* did not in any manner affect, or impair it, and it was not misconduct on their part, and the rights of the accused were not prejudiced. 35 Ann. 970, 96.

II.

The motion for a new trial having been overruled, the defend sought to arrest the judgment on the ground that the verdict—which was reduced to writing—is null and void, because it is vague, uncertain and illegal in form; not in accordance with the written instructions of the court; and not responsive to the charge in the indictment, or “any charge of crime known to the law,” and it cannot, therefore, be enforced.

The indictment is brought up in the original, and thereupon is indorsed the verdict of the jury, which is, *ipsissimis verbis*, viz:

“We, the jury, find the accused guilty with and assault by suting with intent to murder. L. E. RICHARDS, Foreman.”

There is special complaint made of the phraseology as being vague and uncertain, and our attention has been directed to the words “with and assault,” and “suting,” as illustrative.

It is clear to our minds that the idea the jury intended to convey by the former was, that they found the prisoner guilty of *an assault* with intent to murder, and only clothed that idea with inartificial verbiage.

Among the different forms of verdict which the judge directed the jury they might render, is the one following, to wit: “We, the jury, find the prisoner guilty of an assault with intent to murder.”

The latter word “suting” is undoubtedly a *lapsus penna*, and the result of accident, or inadvertence, and was intended to have been written *shooting*. It appears from a bill of exceptions reserved by the district attorney that, when the verdict was first returned into court and read, he discovered there was some ambiguity, or uncertainty in its language, and requested the court to direct the jury to retire and bring in a

Caldwell vs. Railroad Company.

plain and responsive verdict. This request was declined by the judge, who assigned the following reasons for so doing, viz: "The court considered the verdict responsive and intelligible. When reading the verdict the clerk hesitated at the word in the verdict spelled "*sutinge*," and the foreman of the jury at once prompted by stating that the word was "*shooting*." On motion of defendant's counsel, the jury was polled, and the clerk read the verdict, distinctly, pronouncing said word "*shooting*."

"The prompting by the foreman was before the district attorney made the motion to have the verdict corrected; and considering that word as being intended and written for shooting, the court considered the verdict as being intelligible and fully sufficient to be the basis of sentence."

The judge declined to set aside the verdict at the request of the defendant, and to this ruling he reserved a bill, and thereto the judge appended a statement, in which he assigned like reasons, and some additional ones, viz: that many words beginning with the letters "s" and "u" are pronounced as though spelled "shu" or "shoo," and hence the rule *idem sonans* applied. He further assigned that "if what followed the word "guilty" is not intelligible it is to be rejected as surplusage."

In our minds there is no doubt of the fact that the jury intended the word "*sutinge*" for "*shooting*." and such being the case, their verdict is responsive to the indictment, and to the charge of the court, and the judge correctly declined to set the same aside. *Vide*, State vs. Scott Ross, 32 Ann., 854, with which the instant case is almost identical.

Judgment affirmed.

No. 226.

JOHN CALDWELL VS. VICKSBURG, SHREVEPORT AND PACIFIC RAILROAD COMPANY.

Corporations must be sued at their domicile for damages arising from the passive breach of their obligations, such as negligence and nonfeasance.

The law as expounded in 30 Ann. 607; 33 Ann. 954; 36 Ann. 186; 39 Ann. 1066, as to the interpretation of Sec. 9, Art. 165, C. P., reaffirmed.

A PPEAL from the First District Court, Parish of Caddo.
Hicks, J.

Alexander & Blanchard for Plaintiff and Appellee.

Wise & Herndon for Defendant and Appellant.

40	753
48	325
40	753
110	749
40	753
e118	90
40	753
121	520

Caldwell vs. Railroad Company.

The opinion of the Court was delivered by

McENERY, J. The plaintiff sues the defendant for injuries sustained by the breaking through of a bridge constructed by defendant over a public crossing in the city of Shreveport. He alleges that the bridge was defective at the time of construction, and was built in an improper manner and of inferior material. The company excepted that its domicile was at Monroe, La.; that suit should have been brought there; that it had done no act to bring it within the provisions of Sec. 9 of Art. 165 of the Code of Practice. The exception was overruled, and on the trial on the merits, there was judgment for the plaintiff condemning the defendant to pay damages to the amount of five thousand dollars. The plaintiff alleges gross negligence and default of defendant's company in not constructing and maintaining a safe and suitable crossing at the place where he was injured. It is an act of omission, nonfeasance, dereliction of duty and not the commission of any act that implies force or violence that is alleged by plaintiff. Art. 165, C. P., provides that, "in all cases where any corporation shall commit trespass or do anything for which an action for damages lies, it shall be liable to be sued in the parish where such damage is done or trespass committed." An interpretation of this article was given in the case of *Montgomery vs. Louisiana Levee Company*. 30 Ann. 607.

Act No. 4 of 1871, imposed upon the defendant company liability in damages for failure or neglect to keep up to standard height a levee, the breaking of which inundated plaintiff's plantation. The defendant excepted to the jurisdiction of the court where the suit was brought, alleging the domicile of the company was in New Orleans. The exception was sustained. In rendering the opinion of the court, Associate Justice Marr clearly draws the distinction between acts of commission implying force and violence and acts of neglect, failure, or omission, passive violations of duty.

The court says: "The plain language of Sec. 9, of Art. 165 of the Code of Practice, is that for things done, for acts of *commission* for which an action for damages lies, the suit may be brought in the parish in which the damage is done, but that this rule does not apply to omissions, neglect or failure to do, because wrongs of this latter class are not only not mentioned in this article but are excluded by the use of the words *commit* and *committed*, *do* and *done*, which necessarily imply action."

In the case of the State *ex rel.* Morgan's L. & T. R. R. and Steamship Company vs. the Judge of the Twenty-sixth Judicial District

 State ex rel. School Directors vs. Police Jury.

Court, after reconciling the provisions of defendant's charter with Art. 165 C. P., the court say; "The word trespass used in the charter was employed in its broadest sense, so as to comprehend a variety of wrongs having the common element of a *use* of force whether direct or indirect."

In the instant case there is no allegation implying trespass, force or violence, either direct or indirect.

In the case of the heirs of Gossin vs. Williams and Morgan's L. & T. R. R. and Steamship Company, this court said: "It is evident that the legislature by granting to the company immunity from suit, out of New Orleans, its legal domicile, *except in cases of trespass*, meant to confer some privilege or advantage which otherwise would not have existed. The design was clearly to restrict the character of suits *not* brought at the place of domicile to cases of *trespass*."

In the case of St. Julien vs. Morgan's L. & T. R. R. S. S. Co., 39 Ann. p. 1063, the authorities herein referred to were quoted and affirmed. In this case the doctrine was distinctly announced that, in case the owner of land permits its use and occupancy by a railroad company, and the construction of a *quasi* public building without resistance or complaint he can not thereafter require the demolition of the works nor prevent its use by the company, but that he is not debarred of his action for compensatory damages, if instituted at the domicile of the company. He can not treat such entry as tortious and sue the corporation as a trespasser at the place where the injury is alleged to have been sustained."

The conclusion we have reached from a careful review of the authorities, is that the plaintiff's suit does not come within the exception to the general rule that the defendant must be cited to appear at his domicile to answer plaintiff's demand.

It is therefore ordered, adjudged and decreed that the verdict of the jury be set aside and the judgment appealed from be annulled, and it is now ordered, adjudged and decreed that the defendant's exception to the jurisdiction of the court *a qua* be sustained, the suit dismissed and that all costs be taxed against plaintiff and appellee.

 No. 234.

THE STATE EX REL PARISH BOARD OF SCHOOL DIRECTORS VS. POLICE JURY.

The word "may," found in section 54 of Act No. 81 of 1888, does not mean *shall*. Traced back, through the last sentence of Article 229 of the Constitution to Act No. 23, Sec.

State ex rel. School Directors vs. Police Jury.

tion 28, of 1877, which the framers of that instrument intended to continue in force in that respect, it simply means are *authorized*.

The Constitution merely directed that the Legislature "shall provide that every parish *may* levy a tax, which means, *is authorized or empowered*.

Any legislation seeming to impose upon police juries the *duty or obligation* of levying the tax would transcend the delegated authority and so be unconstitutional and barren of effect.

Police jurors are therefore clothed by law with the discretionary or optional power of levying or not, as in their wisdom they may see fit and proper, the tax in question for school purposes.

In case of a failure to levy the tax, no *mandamus* can issue to compel the levy.

A PPEAL from the Tenth District Court, Parish of DeSoto.
Hall, J.

J. O. Pugh, District Attorney, for Plaintiff and Appellee.

E. W. Sutherland for Defendant and Appellant.

The opinion of the Court was delivered by

BERMUDEZ, C. J. Relying upon Section 54 of Act No. 81 of 1888, the relators seek by *mandamus* to have the Police Jury of De Soto parish commanded to levy a one and a half mills tax for common school purposes.

One of the grounds of resistance urged by the Police Jury, is that the levy of such tax rests in their discretion, and that they cannot be judicially constrained to exercise it.

The district court having made the *mandamus* peremptory and ordered the levy of the tax asked, the Police Jury have appealed.

The section relied on (54) enacts substantially, that the police jurors of the several parishes *may* levy, for the support of the common schools of their respective parishes, not less than one and a half mills of the ten mills on the dollar of the assessed valuation of the property thereof, to be provided for in their annual budgets, and that, on the refusal or neglect to levy said tax, or to vote for such levy, the parish school board shall have the right, and it shall be its duty, to compel by *mandamus* the levy of said tax.

The relators contend that this provision is mandatory and that the Legislature had the power, under the Constitution, to enact such legislation, which is obligatory and should be carried out.

In order to show that the language is mandatory, the relators argue that the Statute provides that, on the refusal or neglect of the Police Jury to levy said tax or to vote for it, it shall be the right and duty of the school board to compel them to do so by *mandamus*, which is a

writ which issues to coerce specific performance when no discretion to do or not to do exists, in other words, to coerce a ministerial duty.

It is evident that the first part of the section merely provides that police juries "*may*" levy a tax. The word "*may*," in its usual acceptance, is merely permissive. It is true, however, that cases have occurred in which that word has been construed to mean *must* or *shall*; but the question is, in the instant controversy, whether it has that meaning and purport.

The Statute is not an original piece of legislation, which the General Assembly would be authorized to enact *proprio motu*, in consequence of the possession of the powers vesting generally in such bodies. It is a legislation which, in Louisiana, owing to constitutional restrictions on the law making power, must find, to be valid, its authority in the organic law itself, and which was enacted under a constitutional behest.

We deem it unnecessary to enter into any inquiry as to what the powers are of the State and of the parishes to levy taxes for the common schools for general or local purposes, as there exist in the Constitution special provisions for the exercise of the right of taxation for those objects.

Article 229 of that instrument, in its concluding part, directs distinctly and unmistakably that the Legislature "shall provide that every parish *may* levy a tax for the public schools therein, which shall not exceed the State tax, *provided* that, with such tax, the whole amount of parish taxes shall not exceed the limit of parish taxation fixed by this Constitution."

It is apparent that the Legislature of 1888 bore this article in mind when the section in question was framed, as the very word "*may*," which is found in the constitutional provision, is repeated in this section.

The law giver says: The Police Jurors of the several parishes *may* levy, etc. Had the word *shall* or *must* been used, it manifestly would have been employed in excess of the power delegated by the Constitution, unless the word *may* therein found was really designed to mean either *shall* or *must*, and was intended to be imperative, from all stand-points, on the police juries.

It cannot be argued, however, that the word "*may*" in the article has that purport, for it is glaring that the framers of the organic law did not so propose, but merely contemplated to continue in existence, to some extent, a pre-existing statute on the same subject, namely, Act No. 23, Sec. 28, of 1877, p. 36, which provided that police juries *are*

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authorized to levy a tax for the support of common schools, which shall not exceed two mills, etc.

So that, in order to ascertain the meaning of the word "*may*" in Sec. 54 of Act 81 of 1888, recourse must be had to the concluding sentence of Article 229 of the Constitution, in which it is used, which requires the Legislature to vest police juries with the power of levying the tax, and, in order to realize the meaning of that word in that Article, reference must be had to the legislation *in esse* at the date of the adoption of the Constitution.

By this process, the purport and meaning of the word "*may*" in the Statute of 1888 are readily ascertained to be *permissive* and not mandatory.

Therefore, the section under consideration must be read as meaning that the police jurors of the several parishes, etc., *are authorized* to levy, etc., and cannot be viewed as imposing upon them absolutely, the duty or obligation to levy the tax.

It consequently follows that the term used is not mandatory, but permissive only, and that the propriety of the levy of the tax is merely optional with police juries, who, in their wisdom, may or not exercise the prerogative.

Having been clothed with discretionary powers only, and not burdened with any duty, it cannot be claimed that they can be forced by any judicial authority to exercise it, one way or the other, and that the relators have any standing in court to claim the tax as a matter of right.

It is, therefore, ordered and decreed that the judgment appealed from be reversed, and it is now ordered and decreed that the application for a *mandamus* herein be refused with costs.

No. 1319.

THE STATE EX REL. R. T. MCCLENDON VS. JAMES H. SIMMONS.

The proceedings of police juries must be kept in writing.

The minutes of their proceedings make up a public record imparting absolute verity, and they cannot be attacked or contradicted in a collateral action, to which the board are not made parties. Nor can their secretary in such an action be required to correct alleged errors, or supply alleged omissions in their minutes.

A PPEAL from the Third District Court, Parish of Claiborne.
Barksdale, J.

John A. Richardson and McClendon & Seals for the Relator and Appellee.

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Joel A. Richardson and John Young for the Respondent and Appellant.

The opinion of the Court was delivered by

POCHÉ, J. This case involves the right to the office of Treasurer of Claiborne parish, and defendant appeals from a judgment decreeing relator to be entitled to the office.

Both parties claim to have been elected to the office on the same day by the police jury. The official minutes of the body for that day, which are in evidence, contain the following entry: "When, on motion, the board proceeded to the election of parish treasurer, and after several ballots, R. T. McClendon was elected treasurer for four years next ensuing," and the proceedings of the succeeding day show that the minutes of the previous day were duly read and approved.

This showing unquestionably makes a *prima facie* case in favor of the relator. In order to meet it, defendant had recourse to parol evidence, the testimony of the secretary of the board to show that, at the first ballot taken on that day, defendant had received four out of seven votes cast, and that the president had arbitrarily refused to declare his election. He also proposed to require the witness to correct the minutes by supplying an omission to enter therein the fact and the result of alleged first ballot taken on that day resulting in his election, and of which no mention had been made in the minutes.

The attempt was properly resisted by relator, who contended that the minutes of the board could not be thus attacked in a proceeding to which the president and members of the police jury had not been made parties.

His position is fully sustained by law, and it disposes of defendant's pretensions to the office.

It is elementary that the proceedings, ordinances and resolutions of police juries must be kept in writing. Police Jury of Ouachita vs. Town of Monroe, 38 Ann. 630. In that case the court used the following language, in dealing with an effort to prove by parol, authority in the president to stand in judgment for the board:

"In his oral argument he (counsel) referred as proof of such authorization to the affidavit of plaintiff in support of the injunction prayed for, but he could not have been serious in such a contention."

"Police juries act only by ordinances, or resolutions, and so parol testimony would be admissible to prove either."

The argument of defendant's counsel that the proposed correction of the minutes was not intended to contradict the record but merely to

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supply an omission, a proceeding sanctioned by jurisprudence, is untenable.

The record, as made by the minutes, show that R. T. McClendon was elected treasurer, and the proposed correction would show the election of another person, J. H. Simmons, his opponent at the election. If such a proceeding is not a contradiction we can hardly conceive an instance of contradiction.

The contention is squarely covered, and it must be controlled, by the views announced by the court in the case of Gaither vs. Tax Collector et al., 40 Ann. 362, from which we make the following quotation as fairly decisive of the point under present consideration:

"The official minutes of the proceedings of the board of levee commissioners show, that they levied the tax in question at a meeting duly convened and held at Delta, Louisiana, on the 22d of January, 1886."

"Plaintiff's counsel sought to impeach this record by parol evidence, but the introduction of it was successfully resisted by defendants, on the grounds, viz:

1. "That the official minutes of the board constitute a public record which imports absolute verity on its face, and same cannot be contradicted by parol, nor attacked in collateral proceedings to which said commissioners are not made parties." * * * *

"In our view of this question, it cannot be examined and decided in the collateral way, and in a suit to which the commissioners, who levied the tax, are not made parties." And the court refers with approval to the following dictum from the court of a sister State:

"If a town corporation makes an erroneous record of its proceedings, this cannot be contradicted in a collateral action. In such action the record is conclusive. If *false*, and the corporation will not correct the record, a party interested may, by *mandamus*, compel it to make the correction."

That utterance is strongly suggestive of the remedy which defendant once had within his reach for the protection of his rights, but which he has not seen fit to invoke.

Unless the members of a municipal corporation are before the court, there is no warrant for a judicial coercion on their secretary, who is not the officer of the court, to perform any act or duty, touching the records of the corporation.

We therefore conclude with the District Judge that the relator is the duly elected treasurer of the parish of Claiborne.

Judgment affirmed.

Linman et al. vs. Riggins.

No. 223.

H. B. LINMAN ET AL. VS. MRS. JANE H. RIGGINS.

A party who has been administrator of an estate, obtained the order of sale under which the property was sold to pay debts, and inaugurated and consummated the proceedings complained of in an action of nullity, cannot be permitted to impeach them by his own testimony. Such a person cannot be permitted to impeach his own official acts, nor to contradict the judicial proceedings had in the course of his gestion.

There is no legal prohibition against, but there is a legal permission granted to an administrator to purchase property at a probate sale of the effects of the succession he represents, *provided*, he be the surviving partner in community of the deceased.

Complaint made of an order of court directing the sale of property to pay the debts of a succession, alleged not to be due, after the sale is perfected, and in a suit to which the administrator is not a party, do not go to the court's want of jurisdiction, and to avail, same must be seasonably urged, else they will be barred.

A purchaser at a probate sale, made under an order of court, to pay debts of a succession that are stated on a tableau therein filed, is not bound to look beyond the decree recognizing the necessity thereof.

The five years' prescription fixed by the terms of R. C. C. 3543, cures "all informalities connected with or growing out of any public sale made * * * at public auction," and is a bar, perfect and complete, in respect to "minors, married women and interdicted persons."

A PPEAL from the First District Court, Parish of Caddo.
Taylor, J.

J. L. Hargrove for Plaintiffs and Appellants:

1. Where the petition alleges and shows there were no debts due by deceased, there is no administration necessary, and a sale by such administrator is void. 30 Ann. 479; Barton and wife vs. Bouglar and Sheriff; 29 Ann. 560; Burns vs. Van Loon and numerous others.
2. Since the amendment to article 2237 C. C., forced heirs are not restricted in their right to annul simulated contracts of those from whom they acquire interest, by parol evidence to their *legitime*. The right of action in such cases is now unlimited. 39 Ann. 316; Spencer, administrator, vs. Lewis, administrator, et als., 39 Ann. 878; Cole, administrator, vs. Cole et al. (Act 5 of 1884). Minors whose property was sold without legal authority can recover it without tendering the price of sale to the purchaser. 33 Ann. 745, 769.
3. Prescription is suspended during minority of the party against whom it is pleaded. 38 Ann. 209, Barrow et al. vs. Wilson et al., and cannot be founded upon a nullity. 39 Ann. 102, and 29 Ann. 560. Article 990 C. P. only contemplates sales of succession property to pay debts at the instance of creditors. 38 Ann. 651.
4. Any sale or contract without a consideration is void. "The want or failure of consideration may also be proven by parol evidence. Taylor's Evidence, page 969, Sec. 1138, and page 978, Sec. 1150. Receipts in nearly every case can be explained by parol. Taylor's Evidence, page 965, Sec. 1134.
5. In sales of real estate to pay debts of succession all claims should be duly probated and recognized by the proper court. C. P. Arts 9984, 89, 990.
6. The universal legatee stands in the place of her father, W. W. Harper. C. P. Art. 120.
7. Actions to annul fraudulent sale must be commenced within a year after fraud is dis-

40	761
44	49
44	422

40	761
48	600

40	761
108	384

40	761
110	834
40	761
114	697

40	761
115	424

40	761
121	1049

covered. C. P. Art. 673. If no citation was served on the present appellants all the proceedings are void as to them. 30 Ann. 702, Successions W. O. Winn.

Alexander & Blanchard for Defendant and Appellee.

The opinion of the Court was delivered by

WATKINS, J. Plaintiffs, as the heirs of Catherine Linman, deceased wife of Herman Linman, seek the revocation and dissolution of an alleged probate sale of real estate, which was, at the time of her death, an asset of the legal community; and they claim one-half interest therein.

They substantially allege that, notwithstanding Herman Linman administered the succession of the deceased, an administration was wholly unnecessary, inasmuch as it owed no debts that could not have been satisfied out of the assets of the community other than the real estate, for the sale of which there was no necessity.

The petition states that Linman was regularly appointed, qualified and confirmed administrator, caused an inventory to be made, filed a tableau of debts, procured an order for the sale of the real estate to pay debts of the succession, and caused a perfectly formal sale to be made, for the stated sum of about \$13,000 cash.

That on the same day the ostensible purchaser transferred same property to Linman in his *individual* capacity, for \$13,643, part cash and the remainder on terms of credit, with security of mortgage and vendor's lien.

That the price of the probate sale was never paid, and the conveyance thereat to Harper, and from Harper to Linman were simultaneous, and intended to enable the latter to acquire an apparent title to the property indirectly, which he could not acquire directly, and that same are null and void.

That, in the foreclosure of his mortgage, Harper became the adjudicatee at sheriff's sale, and at his death the property passed to his legal representative, and that the conveyance was void because the note Harper held was without consideration.

The defendant plead, as an exception, the want of a previous tender of the amount of purchase price at the probate sale, and which went to discharge the debts of the deceased. With full reservation he answered and averred that Harper's title is one acquired in good faith, under the probate proceedings above recited, under the order of a competent court to pay succession debts, and that the purchaser paid the price, and conveyed the property to Linman. He further avers that all of said proceedings were valid and legal and in good

faith, and thereupon he pleads the prescription of one, three and five years in bar of this action.

On the trial, the court *a qua* dismissed the plaintiffs' action as of non-suit, and they have appealed. In this court the defendant answers the appeal, and prays for a final judgment rejecting plaintiffs' demands *in toto*.

I.

The plaintiffs introduced as their witness the Linman who was the administrator and obtained the order of sale under which the property was sold, and who inaugurated and consummated all of the proceedings above-described, and by whom to substantiate the various allegations of their petition. To the introduction of *this* witness by whom to prove these facts, the defendant objected on various grounds, and among them are the following, viz :

1. That Linman could not be heard to stultify himself and impeach his own official acts as administrator, nor contradict the judicial allegations and judicial proceedings in the succession he administered.

2. That he would not be heard to contradict his own statement under oath, attesting the correctness and existence of the debts placed by him upon the tableau filed in said succession ; and, subsequently, the correctness of the final account, and the genuineness of the debts which purported to have been paid ; or to state that same are not just and due by the succession ; or that he had not, as administrator, paid the same.

3. That he could not be heard to impeach, or contradict his receipt as administrator, in which he acknowledged the payment of the purchase price from Harper.

For the reasons assigned the testimony of the witness Linman was disallowed, and it has been brought up, annexed to a bill of exceptions.

It appears from the succession record that was offered in evidence by the plaintiffs' attorney, that *all* the grounds of objection are well taken, and particularly the one to the effect that he had sworn, in open court, on the trial of the tableau and account, that the debts enumerated were due by the succession, and that same had been paid by him out of the proceeds of the succession sale.

It is absurd to suppose that any court of justice would listen to the statements of any witness in support of such propositions, which would, of necessity, involve the witness' perjury and turpitude ; and, although there is an abundance of it, we deem it unnecessary to cite

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authority in support of our opinion. There is *no doubt* of the correctness of the lower judge's ruling.

II.

The only pertinent evidence in the record on the main issue is that of one of Linman's attorneys.

He states his recollection to be that the whole of the purchase price was not paid in cash by Harper, and that Harper was a creditor of the succession, and desired a title in himself, and intended to convey it to Linman, and give him time to redeem, or pay the debt due him.

This testimony clearly demonstrates that these titles were not fraudulent simulations, but real and actual sales that were translatives of the property, though it may have been for an inadequate price. 40 Ann. Pochelu vs. Catonet.

III.

Simple reference to the Code will suffice to show that there was no legal impediment to a purchase by Linman at the probate sale of the effects of the succession of his deceased wife, and late partner in community.

It provides that "any executor, administrator * * may purchase at the sale of the effects of the deceased, whose estate he may represent, when he is the surviving partner in community," etc. R. C. C. 1146.

There was no occasion for Harper to have accepted title as a person, interposed for Linman. This pretension is groundless.

IV.

Conceding for the argument, that the evidence shows, or would show, that only a small portion of the alleged succession debts were actually and really due, and it would, in no manner, affect the question at issue.

In Webb vs. Keller, 39 Ann., at page 55, we discussed and decided this question, and used the following language, viz: "The complaint made of the order of court directing the sale, on the ground that the estate of Dr. Webb owed no debts, or if it did, none that had been recognized and proved before a family meeting, or the court, does not go to the court's want of jurisdiction. The debts were subsequently placed upon the tableau, and proved to the satisfaction of the judge who was competent, and same was homologated, and he directed the proceeds of sale to be applied to their payment.

"This was a mere irregularity, and not a cause to challenge the proceeding as null and void."

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That suit was similar in many respects to this, and had a like object of attainment, and the quoted ruling is applicable.

V.

In that case we further said that it is the well settled jurisprudence of this court that the purchaser at a sale made under an order of the probate court, which is a judicial one, is not bound to look beyond the decree recognizing its necessity.

"He must look to the jurisdiction of the court, but the *truth of the record* concerning matters within its jurisdiction, cannot be disputed." 14 La. 146; 15 La. 182; 7 R. 66; 7 Ann. 468; 14 Ann. 154, 622; 26 Ann. 596; 29 Ann. 536; 31 Ann. 280. "The purchaser at a judicial sale of property of a succession is not bound to look further back than the order of the court directing the sale." 18 Ann. 485; 21 Ann. 505; 11 R. 72; 16 La. 440; 34 Ann. 1004; Nelson vs. Weis, 39 Ann. 55.

Defendant has stated his case strictly within this rule. All the motu-ary proceedings, and those leading up to, and embracing the probate and judicial sales in question are perfectly regular, and the probate sale was made under the authority of an order of the court to pay the debts of the succession.

VI.

The prescription of five years which the defendant pleads, under R. C. C. 3543, cures "all infomalities connected with or growing out of any public sale made * * * at public auction," and this bar is perfect and complete in respect to "minors, married women or interdicted persons."

The preceding argument and citation of authority, prove that the matters complained of are, in truth and reality, only matters of irregularity, and do not involve an absolute nullity, or illegality. They are all cut off by the defendant's plea of five years' prescription.

VII.

The learned judge of the district court dismissed the plaintiffs' action as of non-suit. It appears clear to our minds that this was not just to the defendant, who has made out her defense most clearly and satisfactorily, and is entitled to final judgment, and the judgment of the court *a qua* must be amended.

It is, therefore, ordered, adjudged and decreed, that the judgment appealed from be amended; and it is further ordered and decreed, that the demands of the plaintiffs be rejected and disallowed, and that, as thus amended, the judgment be affirmed, and at defendant's costs in both courts.

Sandidge vs. Hunt.

No. 238.

L. D. SANDIDGE VS. TURNER HUNT.

A petition in which is demanded by a vendee reimbursement^{by} the vendor of taxes paid since sale, which existed anterior thereto, and damages sustained by him in a loss occasioned by a *private* disposition of the property, states a cause of action as to the former, but not as to the latter.

Suit for reimbursement of taxes paid is a personal action only, prescribed by ten years.

In such a suit no allegation of eviction is necessary, as a *sine qua non* for the discharge of the taxes encumbering the property acquired. It is only necessary to allege the existence and discharge of same.

While we are bound to take judicial cognizance of the principles of the common law as it prevails in other States, this is not true of the statutes of such States, which will be presumed to be just the same as our own in the absence of proof to the contrary.

It will likewise be presumed, in the absence of contrary proof, that taxes assessed under and in pursuance of the laws of Tennessee, are secured by liens and privileges as are taxes assessed under our own laws.

A PPEAL from the Second District Court, Parish of Bossier.
Boone, J.

Lowry & Vance for Plaintiff and Appellee.

Snider & Smith for defendant and Appellant.

The opinion of the Court was delivered by

WATKINS, J. Plaintiff's claim is grounded on the following state of facts, viz:

That he and the defendant entered into a contract of exchange of certain real property, and the act was passed before a notary in this State. The plaintiff sold and exchanged to the defendant his plantation, situated in Bossier parish, Louisiana, and the defendant sold and gave in exchange to the plaintiff certain city lots, with improvements, in Memphis, Tennessee. There is a clause in the act stipulating full warranty and subrogation, in respect to the properties which are mutually conveyed, with the exception of a lot situated on Orleans street, in said city of Memphis, in reference to which there is an express exclusion of warranty. This piece of property, however, cuts no important figure in the case. The properties each party respectively conveyed were specified in the act to be of the value of \$4,000. The plaintiff surrendered possession of his property in Bossier parish to Hunt, and the latter surrendered possession of his property in Memphis to the former. This act of exchange and possession thereunder date in December, 1878, and the petition avers that in 1884 the property he received from Hunt "was seized and proceeded against in the city of Memphis" for delinquent and unpaid taxes, which had

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been assessed against the property he acquired *anterior* to the exchange and against which Hunt had given and contracted an obligation of warranty in his favor. It further represents that "in this emergency *he was compelled to sell* all of the Linden street property at public auction, and received therefor \$1525." He alleges that he paid, in the discharge of such taxes, penalties and costs, the sum of \$542.52, on the 25th of June, 1884. It is further specially averred that "by said forced sale of said property, *owing to the emergency*, the unfavorable season of the year, and *the existing depression of values*, he was damaged in the sum of \$2500, the difference between the estimated and true value of said property, by the parties in the contract of exchange and the amount received at the forced sale," and he demands of the defendant the said two sums, viz: \$542.52 taxes, and \$2500 damages, and prays judgment therefor.

The defendant tenders the following peremptory exceptions, to-wit:

First. No cause of action shown, because *plaintiff sold the property voluntarily*.

Second. That there is no allegation of eviction, or threatened eviction, partial or *in toto*, of which he had notice, and on which proceeding for eviction he defended, nor that he was evicted by a paramount title.

These exceptions having been by the court referred to the merits "without prejudice," defendant's counsel filed an answer, in which he pleads the general issue, and specially avers that there was no encumbrance on the property in question, and denies that the plaintiff was, by any process of law, deprived of the property, or any part thereof, "so as to make this defendant liable for breach of warranty, or for damages."

He also pleads the prescription of one, three, five, ten and twenty years, to all and singular, the demands of the plaintiff.

Judgment went against the defendant for the sum of \$240.36, with interest, his pleas and exceptions having been overruled, and he appeals. In this Court the plaintiff has filed an answer, and prays an increase of the judgment to the full amount demanded in his petition.

I.

Under the plain and unambiguous terms of the Civil Code, we think the plaintiff's petition states no cause of action, in so far as his claim for \$2500 damages is concerned, as will appear by reference to the clause we have quoted above from his petition. It is a concession that he disposed of the property in greater part at a *voluntary* sale, made at public auction. It makes no difference that it *was* done on

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account of financial embarrassment, depriving him of the means wherewith to discharge the taxes due on the property. Indeed, the confessed unfavorableness of the season and the *existing depression of values*" ought to have been a strong reason why he should not have disposed of the property *at a sacrifice*.

"Eviction is the loss suffered by the buyer of the totality of the thing sold, or a part thereof, *occasioned by the right or claims of a third person.*" R. C. C. 275.

To argue that the claim of, and even the seizure of the property by the State of Tennessee, justifies a *voluntary sale and sacrifice* of the property, if you will, under the circumstances given, may be the foundation of such a claim for damages as this, is, in our opinion, to argue against the precepts of the Civil Code. But we *do* think that this petition does state a cause of action with regard to the amount of taxes, penalties and costs he paid. The Code says that "the seller is obliged, *of course*, to warrant the buyer against the eviction suffered by him from the totality or part of the thing sold, and *against the charges claimed on such thing, which were not declared at the time of the sale.*" R. C. C. 2501, This is even so, "although, at the time of the sale, no stipulations have been made respecting the warranty." *Ibid.*

The taxes preferred by the State of Tennessee and the city of Memphis were evidently just such "charges" claimed on the thing as are contemplated by the Code. The district judge evidently entertained this view of the law, and so decided.

II.

This is a suit for reimbursement of money expended in disencumbering the property of taxes, and not one for the collection of the taxes themselves. When payment was made, they became extinguished, and ceased to be.

Hence this is in the nature of a *personal action* and governed by the prescription of ten years. This period has not elapsed since the taxes were paid. It is alleged in the petition that the payment was made on the 25th of June, 1884, and this suit was brought on the 21st of January, 1886. The receipts, which are in evidence, show that the taxes were paid about the former date. R. C. C. 3544.

The defendant's plea of prescription is directly addressed "to the demands of the plaintiff's petition," and not to the taxes assessed by the State of Tennessee. That State taxes are levied and collected pursuant to State laws this court will assume, as a fact coming within its judicial cognizance; and, inasmuch as the statutes of the State of

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Tennessee form no part of the body of the common law, we will presume that they are just the same as those of our State, in the absence of contrary proof.

It is only of the precepts of the *common law* that we are bound to take judicial notice. *Copely vs. Sanford*, 2 Ann. 335; *Klively vs. Sejour*, 4 Ann. 128.

We are of the opinion that the pleas of prescription urged by the defendant were correctly overruled by the judge *a quo*.

III.

The exceptions of defendant, to the effect that there is no allegation that plaintiff had been evicted of the property, or dispossessed by a paramount title, are fully answered by the provisions above quoted from Article 2501 of the Civil Code. This law obliges the seller "to warrant the buyer against the *eviction* suffered by him of the totality, or a part of the thing sold, and against the *charges* claimed on such thing," etc. In case the loss is sustained by an *eviction*, of course, proof of eviction is of the *essence* of the evidence required; but, if the loss is occasioned by the coerced discharge of taxes encumbering the property at the time of the sale, it is quite sufficient for the vendee to prove the *existence* of such taxes at the date of his acquisition of the property to entitle him to recoup the same from the vendor. The Code does not seem to require that such "charges" should have effected an eviction of the vendee, but it appears to us to be clear that it contemplates that the mere *existence* of such charges at the time of sale was enough to authorize the vendee to discharge same, and call on his vendor for reimbursement. It would be quite unreasonable to hold that the vendee was without right to sue because the State of Tennessee failed to give defendant due notice of the tax proceedings in the contemplated expropriation of the property. He was at the time a citizen of this State, and hence a non-resident of the State of Tennessee. Had he waited for that purpose his property might have been, in the meanwhile, sent to sale and the same conveyed to a stranger by an irredeemable title. There is no force in this contention.

IV.

The numerous bills of exception found in the record attest the stubbornness of the contest in the court below, but the necessity for the consideration of very many of them has been obviated by our rulings in preceding paragraphs of this opinion, eliminating the plaintiff's demand for \$2500 damages.

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With regard to the *quantum* and sufficiency of the evidence to establish plaintiff's claim to reimbursement for prior taxes paid, we deem it sufficient for us to state, in general terms, again, that this is not a suit for the collection of taxes *eo nomine*, but for reimbursement for taxes paid. While it is true that there was no proof administered as to the existence of any tax liens, privileges or mortgages, securing said taxes in the State of Tennessee, there is sufficient evidence to show the existence and exigibility of the taxes themselves. Now, if the statutes of Tennessee are to be presumed the same as our own, we are bound to know that the taxes that were assessed in 1878 to 1884 are thus secured on the property assessed, and that no registry of such lien is required.

V.

There seems to be no serious controversy with regard to the *amount* of the judgment appealed from.

The judge *a quo* had the testimony before him and seems to have carefully examined and analyzed it, and we shall not disturb his finding.

• Judgment affirmed.

CASES
ARGUED AND DETERMINED IN THE
SUPREME COURT OF LOUISIANA,
AT
NEW ORLEANS,
IN
NOVEMBER, 1888.

JUDGES OF THE COURT:

HON. EDWARD BERMUDEZ, *Chief Justice.*

HON. FÉLIX P. POCHÉ,
HON. CHARLES E. FENNER,
HON. LYNN B. WATKINS,
HON. SAMUEL D. McENERY,

{ *Associate Justices.*

No. 10,193.

THE STATE EX REL. MRS. ALFRED MILLARD VS. THE JUDGES OF THE
COURT OF APPEALS.

Prohibition lies to prevent the Court of Appeals from exercising jurisdiction over a controversy involving a right to a servitude of light and view, valued at more than \$1000 and a claim for \$1000 damages, together exceeding \$2000, the upper jurisdictional limit of said court.

APPPLICATION for Prohibition.

John T. Whitaker for the Relatrix.

Braughn, Buck, Dinkelspiel & Hart for the Respondents.

The opinion of the Court was delivered by
BERMUDEZ, C. J. This is an application for a Prohibition.

State ex rel. Millard vs. Judges.

The relatrix complains that the Court of Appeals has, over her objections, assumed jurisdiction over a controversy involving *more* than \$2000.

The respondent judges return that the court over which they preside has jurisdiction, the matters at issue being *less* than \$2000.

The relatrix brought suit to compel the closing of a window, opened in a wall built by an adjoining proprietor and overlooking her premises.

The substantial averment of the relatrix is, that the opening has materially impaired and diminished the value of her property to an extent exceeding one thousand dollars and that the enjoyment of the same by the defendant has occasioned her injury assessed at \$1000.

The prayer is for a perpetual injunction *and* for one thousand dollars damages.

From a judgment decreeing the closing of the window and reserving the claim for damages for future action, the defendant appealed to the Court of Appeals in this city.

Relatrix objected to the jurisdiction of that court, but her objections were discarded.

Thereupon, she sought relief here.

It is apparent that the suit rests upon the fundamental assumption that the relatrix is the owner of certain lots on which she resides, which are free from all right of servitude in favor of defendant's property; that, in violation of the rights of relatrix, defendant has made an opening in his wall, overhanging her premises, in consequence of which the value of her property was materially impaired and has decreased to the extent exceeding one thousand dollars; that by the destruction thus occasioned of the privacy of her residence, she had sustained damages assessed at \$1000, at the time of the bringing of her action, and that said damages are continuous, etc.

The petition, therefore, contains *two* demands: *one* that the defendant be forbidden from enjoying the window, and *another*, that the defendant be condemned to pay \$1000 for damages incurred.

The questions at issue are, therefore: 1st., the existence *vel non* of a right of servitude of light and view, involving a title to real estate; and 2d, a money demand put down: the former at more than \$1000, the latter at \$1000, which together surely exceed \$2000, the upper jurisdictional limit of the Court of Appeals.

The depreciation of the property and the damages are *not* one and the same thing. They constitute *two* different objects and grounds of complaint.

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The depreciation does not constitute the damages claimed and the damages asked do not represent the depreciation.

It will not do to say that this is not so, because the prayer of the petition is narrowed down to a demand for \$1000 damages, as the prayer is *also* for the perpetuation of the injunction, which means a judicial recognition that the property of the plaintiff owes no servitude to that of the defendant.

If, instead of the suit having been brought by the plaintiff, it had been instituted by the defendant, to have her right to the window recognized, under a proper averment, it is undeniable that the case would have been appealable directly to this Court.

A germane question was decided in the case of *State ex rel. D'Arcy*, 25 Ann. 621, in which it was held that the question whether the relatrix had the right to build a wall on her property, involves a larger interest than the amount claimed as damages and concerns the right of property and its enjoyment, affecting the value of the property on which the wall is built. See 11 Ann. 455; 39 Ann. 1102.

The court subsequently passed on the merits of the suit. 28 Ann. 424.

In an analogous case, the present Court has ruled in a similar manner. *State ex rel. Levet vs. Lapeyrollerie*, 38 Ann. 913, and the doctrine there announced was reiterated in a parallel controversy involving both a right to a servitude and a claim for damages. *Russ vs. Egan*, 39 Ann. 917.

It is therefore ordered and decreed that the restraining order herein made be maintained and the prohibition asked be made preemptory.

No. 10,184.

CHARLES ANDREW JOHNSON VS. CHARLES CAVANAC, TAX COLLECTOR.

The Supreme Court has no jurisdiction over tax suits regardless of the amounts involved unless the legality or constitutionality of the tax be in contestation.

In a case where the party resists the payment of a tax, on the grounds of payment, of illegality in the assessment, or of the mode of levying the tax and of other irregularities involving the validity of the tax, the amount of the tax claimed, and not the value of the property seized therefor, is the matter in dispute.

In such cases, if the amount of the tax does not exceed \$2000, the Supreme Court has no jurisdiction.

A PPEAL from the Civil Court for the Parish of Orleans.
Houston, J.

Chas. F. Claiborne for Plaintiff and Appellee:

1. This Court has no jurisdiction of an injunction taken by the owner of property to restrain the sale thereof for an amount of taxes less than \$2000, even if the property is worth more than \$2000. 38 Ann. 39, 230, 99; 36 Ann. 801, 392.

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2. The assessment roll must designate the lot according to a particular plan. 37 Ann. 60.
3. Registry laws apply to the State for its taxes. Constitution 1868; 30 Ann. 1365; 26 Ann. 592; 28 Ann. 496; 31 Ann. 514, 517.
4. If the State neglects to record its delinquent tax list within the time prescribed by law, it loses its privilege as against third persons, and retains only a mortgage. 36 Ann. 272; 34 Ann. 1131; 31 Ann. 286; 29 Ann. 415; 28 Ann. 496, 305; 27 Ann. 460, 407, 244, 275, 48; 26 Ann. 80, 592; 24 Ann. 610; 23 Ann. 286; 20 Ann. 80, affirming; 12 Ann. 778. 18 Ann. 142; 16 L. 292.

Walter H. Rogers, Attorney General, and James C. Moise for Defendant and Appellant:

1. Tax collectors may proceed to enforce collection of taxes upon copies of the delinquent roll deposited in the recorder's office when the original assessment rolls are missing—Act 50 of 1877, p. 81.
2. Section 1 of Act 82 of 1884 provides that property offered for sale under the authority of that act shall be advertised by a description "sufficient to identify, describe or deliver the property."
3. Absolute perfection in the description of property on assessment rolls is not required. It is sufficient if it be such as not to mislead the owner. *Blackwell Tax Title*, 139 to 140; *Cooley on Tax*, pp. 286, 285; *Woodside et al. vs. Wilson*, 32 Penn. St. 55, 57; *City vs. Miller*, 49 Penn. St. 455; 13 *Sergeant & Rawle*, 360; 4 *Watts*, 351, 355; 18 Penn. St. 151; 58 Penn. St. 290; *Rougelot vs. Quick*, 34 Ann. 126; 1 Ann. 195.
4. Where the law provides for the mode and manner of correcting assessments, and every opportunity is afforded the taxpayer to have the defects and errors of his assessment corrected, if any exist, he cannot afterwards plead such errors as a defense against the enforcement of the tax. A tax payer will not be permitted to profit by his own negligence, and is therefore bound by the assessment. 21 Ann. 439; 11 Ann. 195, 69, 251; 23 Ann. 781; 27 Ann. 520.
5. Act 42 of 1871 creates a lien and privilege in favor of the State for State taxes without the filing of the rolls. Sec. 37, p. 115. As the lien and privilege is not created by the filing of the rolls, third persons have full notice of the existence of the tax lien and privilege to be created for each year's tax before the filing of the rolls. When such filing takes place it operates as a registry of the lien and no mortgage can prime such lien unless recorded after the taxes are delinquent and before the filing of the rolls.
6. No act done in contravention of a positive prohibitory law can affect the rights of the State, when such law was adopted expressly to preserve those rights. Therefore, a sheriff who violates the law by passing an act of sale to a certain purchaser, without seeing that all the taxes are paid cannot release the property from the burden of paying the tax. Section R. S. 3620; 33 Ann. 382.
7. A mere declaration in a notarial act of sale that all taxes had been paid cannot bind the State of Louisiana, where no receipt or certificate to that effect had been exhibited to the notary, or when no evidence was adduced that the receipt or certificate was lost or mislaid.
When such declaration was brought to the notice of counsel after trial, it should not be considered, there being no allegation of payment and the deed of sale not having been introduced for the purpose of proving payment.
8. Where the Recorder of Mortgages omits to recite in his certificate a lien and privilege in favor of the State for the tax of a certain year, the purchaser should not hold the recorder. The State cannot be made to lose her tax by reason of the recorder's mistake. *Morano vs. Shaw*, 23 Ann. 322.

The opinion of the Court was delivered by

POURÉ, J. Appellee's suggestion that the matter in dispute in this

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case is in amount less than the lower limit of our jurisdiction is well founded.

The suit is an injunction to restrain the sale of plaintiff's property for State taxes amounting to \$236.50, which are alleged to be not due on several grounds, one of which is that a portion of the taxes claimed have been paid, and on other grounds of alleged illegality in the mode of assessing the property, of levying the taxes and in the want of proper registry. Nothing in the pleadings suggests an issue involving in any way the legality or constitutionality of the tax which plaintiff resists; the only feature which could vest jurisdiction in this court, irrespective of the amount involved. Constitution, Art. 81.

If, instead of enjoining the sale, plaintiff had paid the sum of \$236.50, with interests, penalties and costs, for which his property was advertised, there would have been an end of the case. He is therefore in the attitude of a defendant in execution of a judgment in a sum less than two thousand dollars, and the amount of that judgment, not the value of the property seized, would be the matter in dispute between the plaintiff in execution and himself.

The matter in dispute in this case is the contested right of the State to enforce the payment of taxes amounting to \$236.50, by levying on plaintiff's property; hence the value of his property is no factor in the jurisdictional features of the controversy.

To this purport have been the uniform rulings of this court. *Agmar vs. Bourgeois*, 36 Ann. 392; *Cobb vs. McGuire*, 36 Ann. 801; *State ex rel. David vs. Judges*, 37 Ann. 898; *Denis vs. Houston*, 38 Ann. 39; *Minor vs. Budd*, 38 Ann. 99; *Favrot vs. City*, 38 Ann. 230; *New Orleans vs. Schoenhausen*, 39 Ann. 237.

But counsel for appellant contend that the real issue in the case is the contested right of the State to offer for sale for unpaid taxes property exceeding \$2000 in value, which property was in truth owned by the State, the proceeding being carried on under the provisions of Act 82 of 1884.

That contention is not borne out by the pleadings, and is effectually contradicted by the evidence in the record, which consists mainly of admissions made by counsel of both parties.

The issues tendered by plaintiff are stated in the first part of this opinion, and, among other reliefs sought by him, plaintiff asked that the assessment of his property for the years 1871 and 1872, in the name of John Coleman, be annulled, and that the property be stricken from the delinquent list for said years; he also prayed for the erasure of the inscription thereof in the mortgage office. The issues thus ten-

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dered were met by a general denial and by a special denial of the alleged payment of the taxes claimed, and of the alleged cancellation of the inscriptions by the Sheriff, who had sold said property in an executory process.

We therefore repeat that the pleadings suggest no other issue but the contested right of the State to enforce the payment of the taxes resisted by plaintiff.

The record contains an admission by appellant's counsel that the advertisement was for taxes amounting to \$236.50, assessed for the years 1871 and 1872, in the name of John Coleman, the original owner of the property, "of which C. A. Johnson is the present owner." It is too clear for argument that such an admission entirely does away with the present contention, manifestly an afterthought, that the title of the property stood in the name of the State.

Conceding that the proceeding was instituted under the provisions of Act 82 of 1884, which the record does not show, a reference to the act discloses that it provides for the sale of two distinct classes of property :

1. Of property previously adjudicated to the State at a tax sale ;
2. Of property not thus bid in by the State, on which there remain unpaid taxes due to the State prior to December 31, 1879.

And the law requires the advertisement in the first case to give the name of the party in whose name the property was assessed, and in the other instance the name of the present owner.

The latter case is precisely the attitude of the advertisement now under consideration, showing conclusively that the property had never been adjudicated to the State, and that the title stood and yet stands in the name of C. A. Johnson, plaintiff herein.

Hence appellant's contention cannot save the present appeal, over which this Court is without jurisdiction.

It is therefore ordered that this appeal be dismissed with costs.

No. 10,163.

MRS. FANNIE GUNTHER ET AL. VS. THE NEW ORLEANS COTTON
EXCHANGE MUTUAL AID ASSOCIATION.

The fact that by the charter of a mutual benefit association a particular method of notice of assessments falling due is declared to be sufficient and binding on all members, does not exempt the corporation from the operation of the principles of equitable estoppel which apply to all other persons natural or juridical.

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In matters affecting the execution of contracts, the doctrine of estoppel has no use or significance when the contract has been complied with; it is only in cases of non-compliance that the question arises whether the other party has, by his representations or course of contract, estopped himself from setting up such non-compliance as a ground of forfeiture. Forfeitures are not favored by the law; and in cases of insurance, where the company has pursued a course of conduct which leads the insured honestly to believe that, by conforming thereto, his rights will be protected, the company will be estopped from claiming a forfeiture, although incurred under the letter of the contract.

Hence, though the charter provides only for notice by posting, yet if the company adopts the practice of always sending written notice by mail to a particular class of members of assessments due, and if on a particular occasion it failed to send such notice, and if the failure to pay was solely due to the want of notice, and if, as soon as informed, payment was tendered, the company is estopped from claiming the forfeiture.

Upon a review of the evidence, the facts of the uniform custom to send notices, and of the failure to send it in the particular case in which default occurred, that this was the sole cause of non-payment, and that payment was offered as soon as knowledge was obtained, are found established.

A PPEAL from the Civil District Court for the Parish of Orleans.
Houston, J.

W. F. & D. C. Mellen for Plaintiffs and Appellees.

Rayne, Denegre & Bayne for Defendants and Appellants:

Each one of the members of a mutual aid society contracts with each other member, and their contract is a law unto themselves by which they are bound. When the charter provides that the failure to pay terminates membership, this law is conclusive between the members. *Madeira vs. Merchant's Exchange Mutual Benefit Society*, 16 Federal Reporter, 750; 86 Illinois Reports, 479; 18 Central Law Journal, 373; 93 U. S. 31; 104 U. S. 88-252; 44 New York, 276; 63 Md. 86.

Sickness or insanity of the member does not excuse or waive such payment. 82 N. Y. 550; *Hankshaw vs. Supreme Lodge Knights of Honor*, 24 Central Law Journal, 129 and cases cited above.

There was no waiver made as to the manner of notice by adding notice by postal card. No such waiver was in fact, and neither the president nor directors could have made such waiver by any action on their part. The directors are merely administrators of the agreement made by the members with each other.

The opinion of the Court was delivered by

FENNER, J. The defendant is a corporation, organized as a mutual benefit association, the members of which, or their designated beneficiaries, are entitled, at death, to receive an amount equivalent to the sum of certain assessments which are levied upon, and payable by, the surviving members.

Plaintiffs exhibit a certificate of the association reciting the membership of Julius Aroni and that, "in consideration of twenty dollars by him paid as such, said Aroni has secured to his children (the plaintiffs) in the nature of insurance upon his life, all the benefits of said

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association, subject at the same time to the conditions, limitations and penalties imposed by the charter of the association."

Defendant admits the original membership of Aroni and the right of plaintiffs to claim whatever is due under the certificate, but avers that, in accordance with the provisions of the charter, he had, prior to his death, been duly suspended for non-payment of assessments and had entirely forfeited his membership and all claims against the association.

The charter contains the following provision :

"Upon proof of the death of a member, each surviving member shall, within ten days, pay to the secretary the sum of ten dollars. A notice posted in the rooms of the Cotton Exchange shall be deemed a proper notification to all members. Any member not having paid within ten days shall be suspended and shall be treated as not being on the rolls of membership, and in case of his death during the period of such suspension, he shall forfeit all claims upon the association; provided, however, that within thirty days from date of such notice, upon payment of any past dues, and any that would have accumulated had he remained a member of this association, his suspension shall cease. Should any member remain in default after the expiration of the said term of thirty days, he can only be reinstated by a vote of the board of directors, and upon payment of all arrears."

To become a member it was essential that the applicant should be either a member of the Cotton Exchange, or the holder of a power of attorney of a member, or a visiting member, or an employee, of said Exchange; but the charter provided that "any member may withdraw from the Cotton Exchange without severing his connection with this association."

The rule with regard to notice was evidently adopted with reference to the original conditions of membership, under which every member having access to the floor of the Cotton Exchange would have the opportunity to observe the posted notices.

But, as time went on, under the operation of the provision last quoted, there arose a class of members of the association who had ceased to be members of the Exchange and had lost the privilege of access to its rooms. As to them the posting of notices in a room which they were forbidden to enter, became obviously unavailing. We do not say that this change of condition operated the creation of any new right or imposed any duty upon the association to give a different notice from that required by the charter. It might have stood upon its rights and have held the excluded members to the hard lines of

their contract. But it did not choose to do so. On the contrary, it adopted the just and reasonable custom of sending by mail, written notices of all assessments due, to all such members, and even to others who requested it. It is true that the president says that he told such members as spoke to him on the subject that this was a matter of courtesy and not of right; but he does not pretend that he made such statement to Aroni.

Aroni had ceased to be a member of the Cotton Exchange. Under the custom above indicated, notices were always mailed to his address when assessments became due, and he always paid. The custom was to send notices, as soon as an assessment was posted, to all members who, like Mr. Arohi, were not admitted to the Exchange.

In November, 1885, Mr. Aroni was stricken with cerebral apoplexy and softening of the brain, from which date until his death, in the latter part of 1886, he remained in a state of mental incompetency.

Mr. Aroni had an office on Carondelet street and resided in rooms on Canal street, both of which were known to the officers of the association charged with giving notices. In February, 1886, two deaths occurred, of which notices were received at his office, and his son, Mr. Ernest Aroni, promptly paid the assessments.

On March 27, 1886, another member, Mr. Friedlander, died. No notice was ever received of this death either at the office or residence of Mr. Aroni. Mr. Mellen, his friend and associate in much legal business, testifies that he regularly examined his mail and that no such notice came—if it had, he would have attended to it. Mr. Ernest Aroni states he was with his father day and night at his residence and that no such notice came there.

The officers of the association testify that notices were sent out as usual and they presume one was sent to Mr. Aroni, but they do not profess to remember it as a fact or to have any record of any kind to confirm their impression based simply on their ordinary course of proceeding. The liability to accidental omission in sending a large list of notices is too great to justify us in giving to this testimony sufficient weight to overthrow the presumption resulting from the fact that all other notices sent reached their destination and that this one certainly did not.

Another fact still more strongly weighs against the defendant. On the 31st of March, 1886, Mr. R. N. Lewis, another member, died. This was several days before the expiration of ten days from the death of Friedlander, at a time when Mr. Aroni was, in no manner, in default, when the custom clearly entitled him to immediate notice of

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the assessment, and when there was no excuse for not sending it. If the former notice had simply been miscarried in the mail, it is not likely that a similar accident would have happened a second time.

If the latter had been received, all the consequences of the former accident would have been averted. Yet it is admitted that, in this case, no notice was sent. The admitted failure to give notice in this case, being without excuse, supports the probability of failure in the former, and places the association in fault.

There is not the slightest ground for attributing the failure to pay these assessments to any other cause than want of notice. As soon as the default came to the knowledge of the beneficiaries, and long before the death of Mr. Aroni, the parties immediately tendered payment of all assessments due and demanded the reinstatement of Mr. Aroni, which was refused.

We, therefore, accept and treat it as a fact in the case that Mr. Aroni was not notified of any assessment which he failed to pay, unless the simple posting in the Exchange operated as a sufficient notice.

The learned counsel for defendant vigorously maintain that Mr. Aroni was entitled to no other notice than the posting; that the charter is a contract to which he was a party, and by the terms of which he is bound, and that he had not, and no action of the officers of the company could confer upon him, a right to any other notice than that which the charter declared should be sufficient.

We can discover no possible reason why the defendant should be exempt from the application of the principles of equitable estoppel which operate upon all other persons natural or juridical, nor why the mere fact that there was a contract should bar their application.

In matters affecting the execution of contracts, there would never be any occasion for invoking the doctrine of estoppel if the party had complied with the terms of his contract, because such compliance would be, of itself, a sufficient basis for his legal right.

It is only when the terms have admittedly not been complied with, that the question arises whether the other party has, by his representations or conduct, estopped himself from setting up each non-compliance as a ground of forfeiture.

Says Mr. Bigelow: "Where a person, by his words or conduct, voluntarily causes another to believe in the existence of a certain state of things and induces him to act upon that belief, so as to change his previous position, he will be estopped to aver against the latter a different state of things." Bigelow on Estoppel, Introd'n, p. 64.

There can be no doubt that the long continued practice of the de-

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fendant company to send to Mr. Aroni prompt notice of every assessment as soon as made, justified him in believing that he would receive such notices, and in acting on the belief that, by paying when so notified, his rights would be protected.

The case is very much stronger than that of ordinary insurance, where a fixed premium is due at a date certain and where the insured, independently of any notice, is fully advised of his duty in the premises. Here notice of some kind was absolutely essential in order to inform the insured that anything was due. But even in the former class of cases, it has been universally held that, however positive the terms of the contract in requiring payment, unconditionally, of the premiums when due, yet if the company pursues the practice of notifying its policy-holder before the maturity of his premiums, the latter would have the right to expect and to rely on receiving such notice, and that if the company failed to send it in a particular case it would be estopped from claiming a forfeiture for non-payment at the exact time.

This has been held by the Supreme Court of the United States, using the following language: "Forfeitures are not favored in the law; and courts are always prompt to seize hold of any circumstances that indicate an election to waive a forfeiture or an agreement to do so on which the party has relied and acted. Any agreement, declaration or course of action, on the part of an insurance company, which leads a party insured honestly to believe that, by conforming thereto, a forfeiture of his policy will not be incurred, followed by due conformity on his part, will and ought to estop the company from insisting on the forfeiture, though it might be claimed under the express letter of the contract. The company is thereby estopped from enforcing the contract. * * In the present case it appeared that the company had discontinued its agency at the place of residence of the insured soon after the policy was issued and had given him notice by mail, from time to time, where and to whom to pay them. Such notice, it would seem, had never been omitted prior to the maturity of the last installment. The effect of the judge's charge was, that if this was the fact, and if no notice had been given on that occasion, and the failure to pay the premium was solely due to the want of such notice, it being ready and being tendered as soon as notice was given, no forfeiture was incurred. We think the charge was correct under the circumstances of this case. The insured had good reason to expect and to rely on receiving notice to whom and where he should pay that in-

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stalment. It had always been given before, etc." Insurance Co. vs. Eggleston, 96 U. S., 572.

The same doctrine was reiterated in a later case, and was extended to a case where the insurance company was in the habit of receiving the premium though tendered a few days after maturity, and was held to be thereby estopped from claiming a forfeiture when the premium was tendered in a reasonable time after maturity. Ins. Co. vs. Doster, 106 U. S. 30; see also Ins. Co. vs. Pierce, 75 Ill. 426; Attorney General vs. Ins. Co. 33 Hun. (N. Y.) 138; Ins. Co. vs. Tullidge, 39 Ohio St. 240; Ins. Co. vs. Smith, 44 Id. 156; Thompson vs. Ins. Co., 52 Mo. 469; Fitzpatrick vs. Ins. Co., 25 La. 444.

The case last quoted fully recognizes the authority of a mutual benefit association, like the defendant, to change the method of notice provided in the charter and held the company estopped from setting up a forfeiture under the charter notice, where the new notice adopted had not been given.

We consider the present case as fully covered by the principles above set forth.

Judgment affirmed.

No. 10,186.

CHARLES S. PITCHER & CO., VS. THEIR CREDITORS.

The duties of a provisional syndic consist in keeping, as a deposit, all the effects of an insolvent debtor, in performing all conservatory acts which may be necessary in demanding and receiving rents and income of the property, in collecting all claims which may become due during his administration, and in accounting to the definite syndic as soon as he is appointed.

He is not authorized to disburse funds which shall come into his hands.

In case no inventory is made of the effects surrendered but only an estimation is made of their value, and a provisional syndic is placed in possession, and subsequently, a definite syndic is elected, and he causes an inventory to be made which discloses an apparent deficit in quantity: Held, that in the absence of some direct evidence that the provisional syndic has disposed of, or misappropriated them, he cannot be made responsible for the difference.

A PPEAL from the Civil District Court, Parish of Orleans.
Monroe J.

B. R. Forman and Wm. Armstrong, for the Syndic, Appellant.

H. Heidenhain, contra.

The opinion of the Court was delivered by

WATKINS J. The definitive syndic of the insolvents is appellant from an adverse judgment on his opposition to an account filed by the

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provisional syndic. Several of the creditors of the insolvents joined the definitive syndic in his opposition, and are likewise appellants. The grounds of the opposition are :

1st. That the provisional syndic is only entitled to take charge of the estate of the insolvent debtors, and keep the same until a definitive syndic is elected and qualified, and has not the right of administration, or to make any disbursements of moneys entrusted to his care ; and that, in violation of law, he has expended a large sum of money, and has failed to surrender the same to petitioner, and for which he is responsible.

2nd. That he has not accounted for the goods and property which were placed in his hands as provisional syndic, nor the rents he collected from the subtenants of the insolvents, nor other assets he received.

The judgment of the court *a qua* in part sustained the first ground of objection, and ordered the provisional syndic to pay over to the definitive syndic the entire amount with which he had charged himself on his account, viz : \$1926.00, less the sum of \$400 paid in fees to his attorney ; \$50.00 paid to the attorney for absent creditors ; \$77.50 paid to the notary, and \$300 paid for rents, and aggregating the sum of \$827.50.

But the decree "reserved to the provisional syndic the right to prove contradictorily with the syndic and the creditors, that the (stricken) amounts were disbursed by him in the interest of, or that they inured to the benefit of the creditors, and to recover such of said amounts as may be satisfactorily shown to have been *thus* disbursed.

In other respects the demands of the opponents appear to have been rejected, and they have appealed. The appellee has not joined in the appeal, and asks no amendment of the judgment appealed from.

I

The question presented at the threshold of this controversy is whether the provisional syndic was properly allowed credit on his account, with the items and amounts as have been enumerated above. We think not.

The duties and powers of a provisional syndic are distinctly set out in section 1798 of the Revised Statutes.

It says that "the duties of the provisional syndic shall consist in keeping, as a deposit, all the goods and other effects of the insolvent debtor ; * * in performing all the conservatory acts which may be necessary, as well for the interest of the insolvent debtor as for that of the mass of the creditors ; in demanding and receiving the rents and

incomes of the property, as also all the claims of the insolvent debtor, which may become due during his administration ; of all of which he shall render an account to the syndic appointed by the creditors ; and when rendering the account, shall be entitled to demand for his trouble and services one per cent on the appraised value of the goods and effects confided to his care, and five per cent on the rents and income which he shall have recovered during his administration."

This is substantially the eleventh section of the insolvent law of 1817.

In *Barkley vs. His Creditors* 11 R 30, the court construing its provisions, said: "He," (the provisional syndic,) "has nothing to do with the sale of the estate. He is a mere depository, and he takes the property as he finds it upon the schedule of the insolvent, according to the approximate value therein mentioned, which value is to serve as the basis of the amount of the bond which he is bound to furnish. Thus it is clear, that when the provisional syndic renders his account to the syndic appointed by the creditors, *no change* has taken place in the property which came under his administration, and that the same is by him delivered over to his successor under the schedule, and in the *same state* in which it was at the time of the surrender, except whatever increase may have taken place from the rents and income by him received, or from the collections he may have made." (The italics are ours.)

From the foregoing it is perfectly manifest that a provisional syndic has no power or authority to make *disbursements* of the funds that may come into his hands. Such was the purport of our opinion in *Wood vs. His Creditors* 35 A 257.

The district judge granted an order authorizing the provisional syndic "to sell for cash such part of the stock of goods as may be called for," doubtless considering this to be such a "conservatory act" as is contemplated in the section of statutes above quoted ; and it is argued therefrom that, in carrying out this order, certain expenses were necessarily incurred, and it became reasonably necessary that the provisional syndic should pay them in cash. But *that* part of the decree embracing these items is not before us for review, and this order does not effect the remaining issue under present consideration.

Concerning the four items, the payment of which the court approved, it is said in argument that, while the payment should have properly awaited the distribution of funds by the definitive syndic, no good purpose will be subserved by requiring the provisional syndic to reimburse the amount, merely for the purpose of enabling the syndic to place it on his account and return it to the claimants again.

This is the doctrine *ab inconvenienti*, of which courts of justice can take no notice.

The one under consideration is a question of grave and serious import, and it very nearly concerns the creditors of every insolvent debtor.

We are requested to sanction the act of the provisional syndic in distributing the funds of the insolvents, among those whom *he* deemed entitled to receive them, without an order of court, and prior to the election of a syndic, as one that is authorized by law.

We say "without an order of court" advisedly, because the district judge granted but one, authorizing the payment of money, and it embraced but a small portion of one of the items under discussion, and that is \$75 of the claim for rent. This order is *sui generis* and is in these words, viz:

"Let petitioner be authorized to *act* as within prayed for and according to law."

We feel constrained to decline this request and to refuse to sanction the act of the provisional syndic, because it was unwarranted by the law. To concede such authority to a provisional syndic would be to open the door to fraud upon the insolvent debtor and his creditors.

A surrender is made by the insolvent debtor to his creditors and it is accepted by the judge for their benefit. In contemplation of law, all proceedings looking to a disposition of the property surrendered and the application of its proceeds to the payment of creditors, whether privileged or ordinary, are to be postponed until they have chosen a definitive syndic, and he shall have qualified and furnished bond.

In the interim the provisional syndic is required to keep the property "as a deposit" and perform "all conservatory acts which may be necessary" for its preservation and safe keeping.

In the interest of an orderly administration of justice we deem it necessary to rigidly enforce these provisions of the insolvent law.

The provisional syndic made these payments in error, and at his own risk, and he must account to the definitive syndic for the full amount thereof whenever he shall file his account and tableau of distribution among the creditors. *Rodriguez vs. Dubertrand*, 1 R. 538; *Goodale vs. His Creditors*, 8 La. 301.

But we are of opinion that the item of rent stands upon a different footing. The instalments thereof seem to have been evidenced by notes, and the *ex parte* order of the judge *a quo* specially authorized the payment of *one* of them. In addition to this, his general order

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permitting the provisional syndic to make sales of the goods in the usual course of business, and *without opposition by the creditors*, would seem to justify the payment of such *pressing* claims out of the proceeds. Doubtless the judge below viewed this in the light of a *conservatory act* he was authorized to allow, and we will not disturb his ruling under the circumstances.

II.

The contention of the opponents' counsel on the other branch of the opposition, that the provisional syndic has not accounted for the full amount of the merchandise that was placed in his custody, and which was *estimated* in the schedule of the insolvent at \$14,769.50, is somewhat involved.

The facts brought out in the record are about as follows: No inventory was taken of the merchandise that was surrendered, the only mention of it in the schedule being "Merchandise, \$14,769.50."

The cession of the insolvents was made in November, 1886, and a definitive syndic was not chosen by the creditors and qualified until in March following.

He caused an inventory to be made of the stock of merchandise and the appraisement was only \$5,431.93.

It appears that one of the insolvents was appointed by the judge, provisional syndic, and, under the authority of the judge's order heretofore adverted to, he made sales of goods to customers "in the usual course of dealing" to the amount of about \$750, of which he renders an account; but it nowhere appears what *kind, quality or quantity* of goods he sold, the only items in his account that serve as a guide in ascertaining the *amount* of sales being "*mdse sales*," entered with the amounts set opposite, and as of different dates. These daily sales appear to have been very small. In the month of November after the surrender, there is no sale reported as made on any given date of an amount in excess of \$6.65. During the month of December the total amount of sales was \$38.35, and of this amount \$4.20 were realized during the last fifteen days thereof; and on six consecutive days the exact sum of *thirty-five* cents was daily reported as the total amount of merchandise sold. But in the month of February, just before the termination of this trust, we find the items swollen to the proportion of \$39, \$56, \$62 and \$260, respectively.

The consequence was that when the effects of the insolvent were surrendered to the definitive syndic, there was an apparent deficit of \$9,337.57. Whether this was caused by the fault or misconduct of the provisional syndic, or was the result of an overestimate of the value

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in the schedule, or that of natural causes of depreciation, it is difficult to determine from the evidence in the record, which is meagre indeed.

It may be accounted for in part by the increased price for which the goods were sold at public auction by the syndic, the amount of diminution in the value of winter goods disposed of in the spring, the fact that the merchandise was estimated at 20 or 30 per cent above their prime cost, and the further diminution occasioned by the daily sales made by the provisional syndic. We are not prepared to say that any fault is attributable to the latter, but it is manifest that the opportunity was not wanting, though it may not have been taken advantage of. That opportunity consisted in the fact that the insolvents prepared and filed no inventory of the merchandise which they surrendered, and consequently there was absolutely no restraint placed upon him in the disposition of the goods. The opponents have not questioned the authority of the judge to grant the provisional syndic permission to make such sales, and hence it is not the proper subject of discussion now. Therefore we can only refer to it as demonstrating the impolicy of allowing such a trustee to dispose of an insolvent's property and to pay charges at will. Under the facts detailed we are not prepared to say that the provisional syndic has not accounted for all the property that came into his hands. It may be that the insolvents placed too high an estimate on their merchandise, or a portion of it may have been withheld by them after making their surrender, but these are questions to be determined between them and their creditors. We feel bound to concur with the district judge in the views he entertained in this particular.

It is therefore ordered and decreed that the judgment appealed from be amended by rejecting the credits allowed to the provisional syndic for the sum of \$50, paid to the attorney of absent creditors; of \$77.50 paid to Downing, notary, and of \$400 paid to H. Heidenheim, attorney for the insolvents and the provisional syndic, and amounting to \$527.50, and requiring him to account therefor to the definitive syndic when he shall file his account and tableau of distribution, and that, as thus amended, same be affirmed at the cost of the appellee.

No. 10,178.

HENRY DEIKMAN VS. MORGAN'S LOUISIANA AND TEXAS RAILROAD AND STEAMSHIP COMPANY.

To recover damages for injuries received from a railroad Company, it is necessary for plaintiff to prove that the accident, in consequence for which the injuries were received, was

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0107	360

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caused by the negligence of the railroad company, and that the plaintiff was not guilty of any negligence which created or aided in the accident.

A PPEAL from the Civil District Court for the Parish of Orleans. *Tissot, J.*

Hornor & Lee for Plaintiff and Appellee:

1. When the surroundings of a public crossing in a populous city are such as to render it dangerous, it is the duty of a railroad company to take thereat such precautions for the protection of the public as an ordinarily prudent person would consider commensurate with the danger. *Patterson on Railway Accident Law*, Sec. 170; *Beach on Contributory Negligence*, Sec. 65; *Wharton on Negligence*, Sec. 798 (a).
2. If it be proven on the trial of a case that a crossing at which an accident occurred is of such a character as renders necessary the presence thereof of a flagman, for the purpose of protecting the public; and if it be further proven that the presence of a flagman would have prevented the injury, it is negligence on the part of the railroad company operating its line across such crossing, if it failed to post one there. *Patterson*, Sec. 167; *Wood's Railway Law*, p. 1313.
3. When a railroad company does employ a flagman at the crossing of a public street traversed by its line, and an accident there occurs, his failure to perform his duty is negligence for which the company is responsible. *Wood*, p. 1313.
4. When a railroad company has imposed upon itself the duty of having a flagman at a certain crossing of its line, and such custom on the part of the railroad company has been continued for so long a time that travelers have been induced to rely upon it as a means of protection, its discontinuance, without notice to the public, is negligence on the part of the road. *Patterson*, Secs. 167, 169; *Wood*, p. 1314; *Wharton*, Sec. 798 (a).
5. Railroad companies are bound to take extraordinary precautions for the protection of the public in the backing of their trains over a crossing of a street in a city. What precautions are necessary to be taken is to be decided only after taking into view all the circumstances surrounding such crossing. *Patterson*, Sec. 171; *Beach*, 202; *Wharton*, Sec. 805.
6. Train hands must be vigilant and attentive to their duties when the train approaches a crossing. What degree of vigilance and attention is required of them depends upon the character of the crossing. *Patterson*, Sec. 172.
7. Compliance with statutory requirements for the protection of the public at crossings in a populous city, does not relieve the railroad company from the charge of negligence: it must take such precautions as are necessary under the circumstances, and as are required by the peculiar character of the crossing. *Patterson*, Secs. 164 and 165.
8. If a railroad company has been in the habit of giving certain signals of warning at a certain crossing of a public street along the line of its road, and such custom is known to a party injured, such person is not chargeable with negligence if he acts upon the idea that there is no danger because the customary signals are not given. *Beach*, Sec. 23; *Wood*, pp. 1314, 1319 and 1328.
9. Contributory negligence on the part of plaintiff will not avail as a defense when it was the result of excitement and tremor produced by the misconduct of defendant. *Holzab vs. Railroad Company*, 38 Ann. 190; *Patterson*, p. 62.
10. If no signals of danger, such as the character of the crossing demanded, and as were usual there, were given as plaintiff approached it, in time to enable him to protect himself from the moving train, and if there was a locomotive near the crossing with a head-light shining brightly, casting its rays across it in the direction of Canal street, the fact that the plaintiff might have seen the train approach, had he been particularly watchful in that direction, will not debar him from a recovery if it is found that he was watching

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the locomotive with the headlight (the only apparent source of danger), with the view of protecting himself against it. Wood, p. 1317.

11. If a crossing be a specially dangerous one, it is negligence in the railway company if its train approaches the crossing even at a rate permitted by statute or ordinance, when that rate is in excess of that which a due regard for the safety of the public requires, with reference to the more or less dangerous character of the crossing. Patterson, Sec. 158, p. 159.
12. Contributory negligence is well defined to be that want of reasonable care upon the part of the person injured which concurred with the negligence of the railroad company in causing the injury. Patterson, Sec. 47, p. 48.
13. Contributory negligence can, therefore, be proved only by showing: first, that on the part of the plaintiff something has either been done or omitted to be done, which, under the circumstances, and from a prudent regard for his safety, ought, in the one case to have been omitted, or, in the other, to have been done; and second, that that particular act of commission or omission on the part of the plaintiff concurred with the defendant's breach of duty in causing the injury. If the proofs fail to show either of these elements, the plaintiff's contributory negligence cannot be said to be established. Patterson, Sec. 48, p. 48.
14. When the verdict of a jury is based on their estimate of conflicting evidence, and is approved by the trial judge, it will not be disturbed. Fox vs. Jones, 39 Ann. 529.

Leovy & Blair for Defendant and Appellant:

1. In an action of this kind it is essential for plaintiff to prove that the accident was due to some want of care or neglect of duty on defendant's part, and that he was guilty of no negligence which helped to bring about the injuries of which he complains. Pierce on Railroads, pp. 343, 345, 346; Beach on Contributory Negligence, p. 191, § 63, fig.; Id. p. 195; 1 Rover on Railroads, pp. 531 fig.; Murray vs. Railroad Co., 31 Ann. 490; Schwartz vs. Railroad Co., 30 Ann. 15; Mercier vs. Railroad Co., 23 Ann. 264.
2. The evidence establishes the entire freedom from fault and absence of negligence on the part of defendant and its employees.
 - a. The train was moving slowly; the bell was rung continuously; a flagman was at the crossing with a red signal light and gave plaintiff timely warning of the approach of the train; and all the signals and precautions required by law or the particular circumstances of the case were observed.
 - b. A railroad company is not required to stop every time a person or wagon is seen approaching the track. A steam car has the right of way, and those manning it have a right to presume that the traveler will stop in time to avoid a collision. Pierce on Railroads, p. 342; Leason vs. R. R. Co. (Maine), 1 East. Reporter, 101; Schwartz vs. R. R. Co., 30 Ann. p. 19.

As soon as it became apparent that a collision would occur if the train was not stopped, every possible effort was made to stop and avert the accident.
3. The duties of the public and a railroad company at a crossing are mutual and reciprocal. A performance of his duties is as essential to plaintiff's case as a failure of the railroad company to do what is required of it. The evidence discloses an entire failure on plaintiff's part to observe the precautions the law requires of him and shows that he was guilty of such contributory negligence as would defeat his right to recover damages, were the defendant justly chargeable with every fault alleged in the petition or attempted to be proved on the trial.
 - a. It was plaintiff's duty as he approached the crossing to have made a diligent use of his eyes and ears; to assume there was danger and to look out for moving cars, and under no circumstances to attempt to cross ahead of a near approaching train. Whenever by so doing he could have become aware of the train's approach in time to escape, it must

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- be presumed, in case of a collision, either that he did not look or, if he did look, that he did not heed what he saw. He who can see and does not must be treated as if he did see. *Pierce on Railroads*, pp. 343, 345, 346; *Beach on Contributory Negligence*, p. 191, § 63; *id.* pp. 193, 195; *Railroad Co. vs. Hobbes (Maryland)*, 19 Am. and Eng. R. R. Cas. 341; 31 Ann. 490; 30 Ann. 15; 23 Ann. 264.
- b. The evidence shows beyond a doubt that, if plaintiff had looked or listened carefully as he neared the crossing, he would have become aware of the train's approach. Hence he is in this dilemma: either he did not make the proper use of his eyes and ears and was, therefore, guilty of carelessness; or he knowingly attempted to cross the track in front of the approaching train and hence was imprudent and reckless. Either horn of the dilemma is fatal to his case.
- c. The dangerous character of the crossing or the presence of obstructions on the track, if any there were, so far from excusing plaintiff's conduct, heightens its imprudence and negligence. *Beach on Contributory Negligence*, p. 203, § 65; *Patterson's Railway Accident Law*, pp. 171, 172, § 177.
4. Positive outweighs negative testimony. The statements of seven witnesses that they saw a certain thing preponderate over the statements of four witnesses that they did not see it. *Starkie on Evidence*, § 867; 35 Ann. 500, 19 Am. and Eng. R. R. Cas. 276-278.

The opinion of the Court was delivered by

MCENERY J. The plaintiff sues the defendant Railroad Company for injuries sustained in consequence of a collision between a train of cars of the defendant and a wagon driven by plaintiff, in the City of New Orleans, near 7 o'clock p. m., at the Barracks street railroad crossing, on March 17th, 1887.

The testimony, as is usual in cases of this character, is conflicting. But from a careful and attentive review of the statements in the record, we think the following facts are conclusively established. On the evening of the 17th of March, 1887, about 7 o'clock, the incline engine of the defendant company coupled on to six freight cars for the purpose of placing them on defendant's transfer boat, and began to back them in the direction of the Barracks street crossing. This was the only practical way to put the cars on the transfer boat. The train was running at a reasonably slow rate of speed, not exceeding four miles an hour. The electric light at the crossing gave at this time a sufficient light to make plainly visible for some distance the surroundings at the crossing. There were no obstructions to prevent a full view of the crossing from the 3d District Ferry Landing, and the approach of trains from the direction of Hospital street, the direction from which the train came at the time of the collision. The Third District Ferry boat landed about the time the defendant company's train was moving towards the crossing. Three vehicles were driven from the ferry slip towards the crossing, the first two were driven at a comparatively rapid speed and successfully made the crossing when

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the train was some seventy-five feet from them and approaching them. The third wagon driven by plaintiff was ten or twelve feet behind second wagon. The horse was driven on the track and one wheel of the wagon crossed the first rail of the track. At this time the train was within a short distance of plaintiff's wagon, some ten or twelve feet. The flagman was at the crossing, he flagged down plaintiff's vehicle as he had flagged down the other two wagons which had successfully passed over the track. The plaintiff failing to heed the signal, the flagman halloed to plaintiff to stop, or back, and as he still continued in his course, he seized his horse and endeavored to get the wagon from its perilous position. The horse's head was turned until the first wheel of the wagon was parallel with the track, and it became fastened so that it was impossible to get the wagon off in time to prevent the collision which threw plaintiff from it and injured him. The train in consequence of the efforts made before the collision, passed on a few feet and was stopped.

While the train was backing the bell was continually rung. Every reasonable effort was made by defendant's employees to avert the accident. The signal to stop was given, the brakes applied and the engine reversed. The train hands were in their respective positions and were discharging their duties. There were lights at least on the top of the train. These were used as well as the loud voices of the employees to warn the plaintiff of his danger. All these warnings were given and the efforts to stop the train made as soon as it was evident that the plaintiff was in danger, that is as soon as he had reached the track. The crossing, like others in populous cities, is dangerous. The railroad company is bound to take extraordinary precaution for the protection of the public at such places in the management and handling of its trains. Employees of railroad companies must always be vigilant and attentive, and their responsibility must be measured by the dangerous conditions which confront them; the greater the danger, the greater the vigilance and attention.

It would be the greatest carelessness and negligence for a railroad company to fail in any of the requirements necessary to protect the public, at a crossing where persons and vehicles are constantly passing. There is an obligation also on the part of the public to be vigilant and attentive when passing over a crossing where passing trains may be frequently expected. Counsel for plaintiff says in his brief :

"Of course there can be no question, that if the court finds that the flagman was there, it was the greatest negligence on the part of plaintiff to undertake to drive by him." We are convinced that the flagman was at the crossing, and gave timely warning to the plaintiff.

Deikman vs. Railroad and Steamship Company.

Plaintiff's witnesses prove that a flagman was kept at the crossing before and after the accident, but on this particular night they did not see him at the crossing. There must have been some obvious reason for his absence from his post of duty on this particular occasion. The company must have ceased placing a flagman there, or he might on his own responsibility, have quit his accustomed place. Neither of these facts is shown. The plaintiff states that some one halloed to him to stop or back when he got on the track, and in obedience to this he pulled his horse back. The evidence shows that the horse's head was turned so that one of the front wheels was parallel to the track. Who was it that halloed to plaintiff? The plaintiff does not know who it was. But other witnesses identified the party who halloed to plaintiff as Fitzgerald the flagman, who also seized the horse and turned his head towards Canal street, thus placing the wheel parallel to the track. The plaintiff did not hear the bell ringing, or the noise of the cars in motion. He did not see the flagman, or his signals, the lights, or the cars or anything to warn him of the approach of the train. The evidence shows had the plaintiff been governed by ordinary prudence in using his sight and hearing, he would have seen the train in motion, the flagman at the crossing, his signals in his efforts to arrest the course of plaintiff, he would have heard the continuous ringing of the bell and the noise of the train. The plaintiff was evidently paying attention only to the wagons ahead of him, and as these had passed in front of the moving train, he thought he could also do so with safety. After the second wagon had passed he was warned in sufficient time to prevent his attempt to cross the track. There was no violation, no neglect of any of the ordinary and necessary precautions, which could have led him to believe it was prudent to make the attempt.

There is not sufficient evidence to establish the fact contended for by plaintiff, that there was a hole in the track, "longer and deeper than should have been," caused by the neglect of plaintiff to repair the same, in consequence of which plaintiff's wagon was unable to be moved from the track in time to prevent the collision.

The plaintiff has failed to show that the accident in consequence of which he received his injuries, was due to the neglect of the defendant company, and that he was guilty of no negligence which aided in the accident.

It is therefore ordered, adjudged and decreed that the verdict of the jury and the judgment appealed from be set aside, annulled and reversed, and it is now ordered adjudged and decreed that the demand of plaintiff be rejected, with cost of both courts.

State ex rel. Solari vs. Judge.

No. 10,203.

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THE STATE EX REL. J. B. SOLARI vs. T. C. W. ELLIS, JUDGE.

Under the construction placed in jurisprudence on the provisions of Article 318 of the Code of Practice, Rule 29 of the Civil District Court of the Parish of Orleans, which provides that appeals from City courts must be filed before the expiration of the tenth day after the bond of appeal has been filed in the City Court, must be construed so as to exclude in the computation of the time, the day on which the bond has been filed as well as the day on which the transcript was required to be filed in the appellate court, under the rule.

There is no perceptible or substantial difference between Rule 29 of the Civil District Court and Section 2093 of the Revised Statutes of 1870. In dealing with rules of practice the Supreme Court will follow judicial precedents, with a view to the uniformity of such rules.

APPLICATIONS for Certiorari and Mandamus.

E. Howard McCaleb for the Relator:

1. Sections 2079. *et seq.*, R. S. 1870, providing for appeals from judgments rendered by justices of the peace in the Parish of Orleans, were not repealed by the adoption of the Constitution of 1879. They remained in a condition of *innocuous desuetude* until quickened into life by the Constitutional Amendment of 1884. Like Arts. 857 and 858, C. P., regarding the writ of certiorari, or the State insolvent laws, during the existence of the bankrupt act, the operation of these laws was suspended, but they were not repealed. 117 U. S. 201. Hence Sec. 2093, R. S., is the law governing the time within which the record of appeal must be filed in the appellate court.
2. City courts, under the new system, took the place of justices of the peace in the Parish of Orleans under the old system. Sec. 7, Act 45, of 1880; Act 23, of 1888, and Act 129, of 188.; 33 A. 146; 33 A. 419.
3. Sundays must be excluded from the computation in ascertaining which was the *tenth* day after the filing of the bond of appeal. *Dies dominicus non est juridicus.* 9 A. 371; 124 U. S. 131; 6 Rob. 18; 463.
4. In determining whether the record was filed within ten days after filing of the bond (R. S. 2093, Rule 29 Civil District Court), both the day on which the bond was filed (i. e., June 11th), and the day on which the transcript was deposited in the clerk's office of the Civil District Court (i. e., June 29d), must be excluded (C. P. 318, R. C. C. 2059), and this done the appeal was seasonably perfected. The phraseology of Sec. 2093 is identical with Art. 575, C. P., and the decisions are uniform that it takes eleven days to make ten full days in matters of appeal, because the last day is not counted. 29 A. 224; 25 A. 850; 25 A. 136; 30 A. 677.

Henry P. Dart for the Respondent.

The opinion of the Court was delivered by

POCHÉ, J. The complaint in this case is that the respondent judge erroneously dismissed an appeal brought to his court by relator from one of the city courts.

The ground of the dismissal was that the appeal had not been completed in time under Rule 29 of the Civil District Court, which reads as follows:

State ex rel. Solari vs. Judge.

"In any case appealed from a city court, the record must be filed in this Court before the expiration of the tenth day after filing the bond in the court *a qua*, unless such tenth day should fall upon a holiday, in which event the appellant shall be entitled to the whole of the next succeeding day upon which the clerk's office may be open for business within which to file such record."

It appears from the record that the appeal bond was filed in the city court on the 11th of June, and that the transcript was filed in the appellate court on the 22d of the same month.

Relator's main contention is that under the provisions of Art. 318 of the Code of Practice, as construed in our jurisprudence, his appeal was seasonably brought up, because the day on which his bond was filed, and the day on which the transcript was to be filed, under the rule, should not be counted.

The article of the Code provides that "in all cases where delay is given either to do something or to answer, neither the day of serving the notice, nor that on which the act is to be done or the answer filed, are included."

If that provision governs the case, the appeal is saved.

The respondent concedes this conclusion if the question is to be controlled by Sec. 2093 of the Revised Statutes of 1870, which was the law regulating appeals from justice's courts, under the judiciary system which had been established by the Constitution of 1868; but his contention is that the section is necessarily inconsistent with, and was therefore abrogated by, the present Constitution, under which justices' courts, and the tribunal which was then their exclusive appellate court, have both ceased to exist. That section reads as follows:

"All appeals from judgments of the justices of the peace, returnable to the Third District Court, shall be made within ten days after the bond of appeal shall be filed in the office of said justice of the peace."

As we are unable to discover any difference between a rule which requires the performance of an act *within ten days* of a given time, and a rule which requires the same thing to be done "*before the expiration of the tenth day*" of the same time, we cannot make the distinction which is the basis of the respondent judge's conclusions in his ruling complained of. If the appeal was filed *within ten days* after the date of filing the appeal bond in the city court, the act must, in the nature of things, had been done, *before the expiration of the tenth day*, or otherwise it would have been *after*, and not *within*, ten days.

Under these views it becomes unnecessary for the purposes of this case to judicially determine whether the section has been abrogated or

not. It is substantially reproduced in the rule of court under consideration which was evidently predicated thereon; the only change made being in the use of different words, conveying the same meaning.

From the circumstance that the supervisory jurisdiction now vested in this Court did not exist under any previous constitution of this State, it follows, and it appears, that the provisions of Sec. 2093 R. S., have never been construed by this Court, and the proper interpretation of the same provision, as now incorporated in Rule 29 of the Civil District Court, comes up in this case for the first time since the adoption of the constitutional amendment (1884) which vested that court with appellate jurisdiction over city courts.

But we are not without judicial precedents in our present investigation, as we find several decisions of this Court which give an interpretation of the rule in Art. 318 of the Code of Practice as applicable to an analogous provision of law incorporated in Art. 575 of the same Code, which declares that execution of a final judgment is stayed if an "appeal has been taken *within ten days*" after said judgment.

It has been held that in computing these ten days, the day on which the judgment was signed, and the day on which the appeal is taken, should not be included.

Thus in the case of *Garland vs. Holmes*, 12 Rob. 421, it appeared that the judgment had been signed on the 20th of December, 1855, and the appeal was taken only on the 2d of January following, making an actual interval of thirteen days, but after excluding two Sundays, and ruling that the day on which the judgment had been signed and that on which the appeal had been taken should not be included, the court held that the appeal had been taken within ten days after the judgment had been signed.

That case was followed under similar circumstances in *State ex rel. Mercier vs. Judge*, 29 Ann. 224, and subsequently in *Tupery vs. Edmondson*, 29 Ann. 850.

Without expressing our opinion on the subject, if the question was *res nova*, we conclude that the decisions above referred to, in the construction therein adopted of the application of Art. 318 of the Code to expressions precisely similar in Art. 575, have acquired the force of the rule *stare decisis*, and that they must control our ruling in the present controversy. To be efficient, rules of practice must be unequivocal, and hence they must be uniformly expounded.

Thus concluding, we hold that relator's appeal had been seasonably brought up, and that there is error in the judgment of dismissal.

Savings Bank vs. Peuser.

It is therefore ordered that the alternative writ of mandamus herein granted be made peremptory, and that the respondent judge be commanded to entertain, and to pass on the merits of, the appeal taken in the case of Thos. Sully & Co. vs. J. B. Solari from the Fourth City Court of the Parish of Orleans, and that relator recover his costs in this proceeding.

No. 10,183.

GERMANIA SAVINGS BANK VS. GEORGE PEUSER.

The garnishee admits that he has a specific sum in his hands which he received from the defendant, but alleges that he received and holds it for his mother, and, therefore in answer to interrogatories, denies indebtedness to defendant or possession of any property belonging to him. The mother intervened in the suit and asserted her right to the fund. On a traverse of garnishee's answers, judgment was rendered against him but simply ordering him to deliver the fund into the Sheriff's hands, there to abide the decision of the case. From this judgment the garnishee alone appeals. He has no interest in the matter and claims none, and the judgment correctly maintains the seizure of the funds subject to the rights of parties concerned.

The mere fact that a creditor holds collateral securities does not prevent the principal debt from becoming due, nor debar the creditor from pursuing legal remedies for its enforcement. The pledge might be insufficient or invalid. The rights of defendant or of others interested to require surrender or application of the original securities are not involved in this appeal by a garnishee who has neither right nor interest.

A PPEAL from the Civil District Court for the Parish of Orleans.
Tissot J.

Braughn, Buck, Dinkelspiel & Hart and Thos. L. Bayne for Plaintiff and Appellee:

Plaintiff seized, under writ of attachment, in the hands of Gustave Peuser, certain money belonging to Geo. Peuser, who had absconded. The answers of Gustave Peuser were traversed, and traverse tried before a jury, who found that the money was subject to the attachment. The verdict of the jury and judgment of the court are fully sustained by the evidence, and their verdict upon a question of fact will not be set aside except upon conclusive evidence that it is erroneous.

Fox vs. Jones, 39 A. 929; 31 A. 432; 22 A. 31; 20 A. 458; 14 A. 139; 12 A. 297, 759; 11 A. 215, 625.

The garnishee is merely a stakeholder, and has no right to plead for other parties; and the judgment against him should be affirmed or his appeal dismissed. *Hanna's Syndic vs. Lauring*, 10 Martin Rep. 510; 14 La. 514. *Hazard vs. Agricultural Bank of Miss.*, 11 Rob. 336.

The plaintiff has the right to sue his debtor and recover judgment against him, although he holds collateral security, which is in litigation or liable to be rendered valueless by adverse claims. The principal debtor may be sued without proceeding against a security or guarantor.

1 Rob. 135; 4 La. 158; 14 A. 193; *Lewis, Trustee, vs. United States*, 92 U. S. 622; *Colebrook on Collateral Securities*, sec. 113; *Jones on Pledges*, sec. 681.

Savings Bank vs. Peuser.

F. C. Zacharie for Defendant and Appellant :

Where a third party intervenes in an attachment suit, claiming the property attached as owner, and joins the garnishee in all of his defences, such third party is necessarily a party to a rule to traverse the answers of the garnishee, and it is error to deny such third party the right of appearance on the trial of the traverse.

Records of suits between plaintiffs and other parties are *res inter alios acta*, where neither defendant nor garnishee were parties to such suits, and are inadmissible.

A garnishee has a right to plead all defences which may be necessary for the protection of his own interest. Drake on Attachment, § 673; Waples on Attachment, p. 368 and note; 3 A. 285; Drake 696 and notes; 15 L. 253; Drake, 415, 515; 28 A. 69.

A pledgee holding collaterals and not alleging their insufficiency to pay his debt, must proceed against such collaterals, before he can attach other property of his debtor. 11 Wend. (N. Y.) p. 109; Story on Bailments, 320; 1 N. S. 418; 2 N. S. 22.

The burden of proof is on the attaching creditor when seeking to contradict and disprove the answers of garnishee. 4 A. 138; 14 A. 306, 791; 10 A. 31; Waples on Attachment, p. 375, notes 4 and 5.

The attaching creditor must disprove the answers, he cannot assail the veracity of the garnishee as a general witness. 14 A. 792.

Although an attorney be engaged as counsel for one of the parties to a suit, he cannot testify to or make use of what has been confided to him professionally, and confidentially by the other party to the suit. Weeks on Attorneys, p. 261; 50 Mo. 337.

A new trial should be granted when an attorney, in his closing, states facts of which there is no evidence, and such statement is calculated to influence the jury. Weeks on Attorneys, p. 221, sec. 112; 25 Geo. 225; Ibid 24; Ibid 395; 4 E. D. Smith (N. Y.) 253; 55 Mo. 509; 67 Wis. 529; 30 N. W. 790; 34 N. W. 564; 14 N. E. 22; 37 N. W. 914; 38 N. W. 27; 14 Mich. 313; 61 Wis. 114.

The opinion of the Court was delivered by

FENNER, J. Plaintiff, a creditor of George Peuser, an absconding defaulter, took out a writ of attachment against him under which Gustave Peuser was made a garnishee.

In answer to interrogatories, Gustave Peuser disclosed the facts that, on the eve of his flight, his brother, George Peuser, had transferred to his name certain shares of city railroad stock, which he had sold and received therefor the price of thirty-three hundred dollars. This sum, he says, "I subsequently deposited in the Germania Savings Depository in my name, under an agreement with George Denègre, attorney of plaintiff herein, subject to the decision of my mother's rights thereto in this case."

He admits that the money is thus in his hands, that it was placed in his hands by George Peuser, who at the time owned the stock from the sale of which it was realized, and he does not pretend to have the slightest claim upon it in his own right.

But he denies that it is due to George Peuser, and says that it was placed in his hands for their mother to whom, he says, it belongs.

Mrs. Peuser has intervened in the case and is championing her own rights.

Savings Bank vs. Peuser.

As the garnishee denied any indebtedness to the defendant and the possession of any property belonging to him, it was, of course, essential that plaintiff should traverse the answers, because, upon their face, in the absence of any service on the defendant or of any seizure of property, the plaintiff's suit necessarily fell. *Pennoyer vs. Neff*, 95 U. S. 714; *Loughlin vs. Ice Co.*, 35 La. 1184.

Accordingly a traverse was filed. The issue was tried exclusively between the plaintiff and the garnishee. When Mrs. Peuser, the intervenor, attempted to take part therein, objection was made on the ground that the question of her right was not involved and that the decision upon the traverse could not affect her, which objection was sustained by the court.

The traverse was tried before a jury and resulted in a verdict and judgment in favor of plaintiff, but simply "ordering said Gustave Peuser to turn over to the sheriff the said \$3,300 in currency, to be held by said sheriff to await the final decision of this suit, etc."

The only possible effect of this judgment is simply to maintain plaintiff's seizure of the fund and to hold it in court subject to the final decision of the rights of the claimants thereon. A contrary decision would have liberated the fund and have thrown plaintiff out of court. It would, in effect, have been a decision in favor of Mrs. Peuser without trial or hearing.

As the matter stands, no one is prejudiced. Mrs. Peuser's rights are perfectly preserved. She is not, in any degree, affected by this decision. Her intervention is before the court and must be determined before any disposition of this fund can be made. Moreover, she has not appealed. The only appellant is the garnishee, and what possible right he can have to complain is not apparent. He claims no interest in the fund. He admits that he received it from George Peuser, and he suggests no claim that anybody else has upon it except his mother. She has asserted her own claim judicially, and that is the issue upon which depends the disposition of the fund.

The garnishee also filed an exception to the effect that, as plaintiff's claim against George Peuser appeared on its face to be secured by a pledge of amply sufficient property for its payment, the petition set forth no cause of action.

Without discussing the question whether, under the circumstances of this case, an exception of this kind lies in the mouth of the garnishee, the exception, as such, has no merit. The mere fact that a creditor holds collateral securities, does not prevent the principal debt from becoming due nor debar him from pursuing his legal remedies

Avegno vs. Bank.

for its enforcement. *Duncan vs. Elam*, 1 Rob. 135; *Lewis, Trustee, vs. U. S.*, 92 U. S. 622.

In this case, it is in evidence that the title to the securities originally pledged is in contest before the courts. The rights of the defendant or others interested to require the surrender or application of the original securities are not here involved. The garnishee has no right or interest in the premises.

Judgment affirmed.

No. 10,209.

J. NUMA AVEGNO VS. CITIZENS' BANK OF LOUISIANA.

An original stockholder who signs without qualification a subscription for new stock to increase the original stock, is not entitled to cancellation of his subscription and to repetition for the amount paid in, on the ground that all the new shares were not subscribed for.

In the absence of any stipulation or limitation to the contrary, his subscription is not contingent or dependent upon the taking of all the shares, but is absolute and binds him accordingly.

A PPEAL from the Civil District Court for the Parish of Orleans.
Voorhies, J.

W. S. Benedict for Plaintiff and Appellant.

G. A. Breaux and *H. C. Miller* for Defendant and Appellee.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The object of this suit is to annul a resolution of the board of directors of defendant bank increasing the capital and opening a subscription for the new stock and to compel restitution of a sum paid by the plaintiff, in satisfaction of the new stock subscribed for by him.

From a judgment sustaining an exception of no cause of action, the plaintiff appeals.

It appears that the bank having sustained losses, the original capital was reduced to \$350,000, but with which it could not transact its business.

It was then resolved that an additional capital of \$250,000 should be secured and a subscription list was opened, with a preference in favor of stockholders. Only \$25,000 of the new capital was subscribed for, plaintiff participating to the extent of 25 shares of \$100 each.

Weeks, tutrix, vs. Railroad Company.

Grounding himself upon the circumstances that the entire 2500 shares which might have been, were not subscribed for, as he expected, the plaintiff contends that his subscription should be annulled and the money paid refunded him.

There is no allegation in the petition, that when the plaintiff subscribed he did so, on the formal condition that all the shares would be subscribed for.

Had he done so, and had the shares not been subscribed for, he would have been entitled to relief.

The subscription list is not attached to the petition and it must be inferred from its absence that the caption does not contain the qualification.

Had 2,499 of the shares been subscribed for and the subscription paid in, could the subscribers on the sole ground that one share had not been subscribed for, ask the cancellation of their subscription and the return of the money paid over? Surely not, for the plain reason, that the subscription not having been made contingent on a subscription for all the shares, was voluntary, unqualified and absolute and not susceptible of any rescission or revocation.

The plaintiff is therefore concluded by his spontaneous act in the premises.

Judgment affirmed.

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No. 10,107.

MRS. JULIA WEEKS, TUTRIX, VS. NEW ORLEANS, SPANISH FORT AND
LAKE RAILROAD COMPANY.

Passengers crossing a railroad track at a station, in order to leave or board a train halted for that purpose, are not held to the exercise of the same care and diligence which are ordinarily exacted from persons crossing tracks, but are authorized to assume that the railroad corporation will so order its trains that he will be safe from harm on the track which he is thus invited and required to cross in order to secure his passage.

But where a person attempts to board the train while moving, and after it has left the station, he no longer acts on the invitation or stands under the protection of the company, and, while crossing or occupying the track, is bound to use proper care for his own protection.

Evidence discussed and conclusion reached that the injured party here was subject to the last mentioned rule.

Having thus negligently stood upon the track in full view of the approaching train, which rang its bell and sounded its whistle, and having failed to use his senses in his eager absorption in the attempt to board a moving train, in itself an improper and indiscreet act, he must be held guilty of contributory negligence, which debars recovery.

Weeks, tutrix, vs. Railroad Company.

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

Walter D. Denègre for Plaintiff and Appellee:

The evidence shows that the accident resulted from the negligence of defendant and failure of their employees to comply with their own rules and regulations, and the jury so found by their verdict. Their verdict should be sustained, with the increased damages claimed.

The defense of contributory negligence on the part of plaintiff is not sustained by the evidence nor under the law.

Increasing verdicts is a matter within the jurisdiction of the Supreme Court, and it must do justice when the jury has given inadequate compensation. *Sullivan vs. V., S. & P. R.*, 39 Ann. 803, and cases cited.

Contributory negligence, in order to be a defense, must be such negligence as was the proximate cause of the injury. *Hansen, tutor, vs. Railroad*, 38 Ann. 116; *Beads on Contributory Negligence*, sec. 10; *Meeks vs. R. R. Co.*, 56 California, 513.

When the negligence of the defendant greatly multiplies the chances of accident to the plaintiff, and is of a character naturally leading to the occurrence, the mere possibility that it might have happened without the negligence is not sufficient to break the chain of cause and effect between the negligence and the injury.

Courts in such matters consider the natural and ordinary course of events, and do not indulge in fanciful suppositions. *Reynolds vs. Railroad*, 37 Ann. 698.

The rule requiring a traveler on a highway crossing a railroad track to use his eyes and ears to ascertain whether a train is approaching, does not apply to passengers who are crossing a track at a station to get on a train.

It is to be assumed that a railroad corporation, in the exercise of ordinary care, will so regulate its trains that the road will be free from obstruction or interruption when passenger trains are still at a depot receiving and delivering. *Terry vs. Jewett*, 78 New York, 314; *Brassell vs. Railroad*, 84 New York, 241; *Klein vs. Jewett*, 26 New Jersey Equity, 474; *Jewett vs. Klein*, 27 New Jersey Equity, 551; *Moses vs. Railroad*, 39 Ann. 653, and authorities.

When a railroad company provides no way of approach to a passenger train except by crossing on a level another track of the railroad, a passenger is fully justified in concluding that he will be safe from harm from a train on the track which he is thus obliged to cross in order to secure his passage. *Jewett vs. Klein*, 27 N. J. Equity, 551.

Railroad companies are held to the greatest care and diligence, both in regard to the machinery and equipment of the road and the conduct and acts of their officers, agents and employees. *Hansen, tutor, vs. Railroad*, 38 Ann. 111, and cases cited; *Moses vs. Railroad*, 39 Ann. 653.

Running down a passenger who is about boarding another train at a depot or station is gross and culpable negligence. *Jewett vs. Klein*, 27 N. J. Equity, 551.

Failure to introduce testimony of the engineer raises a presumption of negligence against the company. 35 Ann. 698, *Day vs. Railroad*; 38 Ann. 778, *Ketchum vs. Railroad*.

Robert Mott, Harry H. Hall and C. P. Drolla for Defendant and Appellant.

The opinion of the Court was delivered by

FENNER, J. At the point with which we are concerned, the defendant's double-track railroad runs along Bienville street.

Weeks, tutrix, vs. Railroad Company.

At the intersection of Bienville and Napoleon streets lies, on one side of Napoleon street, a square known as Loeper's Park, and on the other or city side a vacant square known and used as a base ball green.

Loeper's Park contains a garden, buildings, places of refreshment, dancing platform, etc., and is used for picnics and a place of resort on Sundays. Its entrance-gate is on Bienville, about 35 feet from Napoleon street.

On Sunday, August 8, 1886, defendant's train, coming from the lake to the city along the track farthest from the park and base ball green, stopped at Loeper's Park gate and took on a number of passengers. It then moved on and, while moving, twenty-five or thirty boys, who had been engaged in base ball on the green, came running towards the train, crossing the intervening track or being upon it, and began boarding the moving train. All succeeded in catching on except the son of plaintiff, an intelligent boy of fifteen years, who waited for the rear coach and was standing on or near the intervening track when the outgoing train running on said track came along and struck him, inflicting severe injuries. The point at which he was struck was about one hundred feet from Loeper's Park gate, which point had been reached by the rear car of the ingoing train.

The present action is brought to recover damages for the injury thus inflicted.

The substantial allegations of the petition, as to the grounds of liability, are "that the injury was caused by the gross negligence, carelessness and want of skill of the defendant's agents and employees;" that the boy "was lawfully in the position occupied by him when run over, about boarding the incoming train at the spot where he was run over, and where said trains usually stopped for Loeper's park;" and that "the said minor was in no way negligent or at fault."

We quote the language of the Supreme Court of the United States as follows:

"The question in such cases is, first, whether the damage is occasioned entirely by the negligence or improper conduct of the defendant, or, secondly, whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of personal care and caution, that, but for said neglect or want of care and caution on his part, the misfortune would not have happened. In the former case the plaintiff is entitled to recovery, and in the latter he is not." *R. R. Co. vs. Jones*, 95 U. S., p. 441.

The same doctrine is fully sustained by our own jurisprudence and was announced by us in the following terms: "Where the injury re-

Weeks, tutrix, vs. Railroad Company.

sults from the negligence of plaintiff and the negligence of the defendant in such manner that the negligence of each may be considered as a juridical cause of the injury, the law will not undertake to apportion either the blame or the damage." *Summers vs. R. R. Co.*, 34 Ann. 144; *Childs vs. R. R. Co.*, 33 Ann. 156.

I.

The main ground upon which negligence is imputed to defendant is that the outgoing train was violating the following general order issued for the government of its conductors and engineers:

"Under no circumstances will you allow your trains to pass each other while taking on or discharging passengers at street crossings. In cases where trains meet at street crossings, the rear coach of the train having the crossing must have passed the pilot of the waiting engine before such engine is permitted to start."

We think it very clear that this order only means that one train shall not run by another when the latter is stopped at a street crossing or other stopping place taking on or discharging passengers, but, in such case, must halt and stand until the latter train has started and entirely passed the pilot of the waiting engine. The rule is an eminently proper one, and if the accident had resulted from its violation and the boy had been run over while properly and lawfully boarding a halted train at its stopping place, the fault of defendant would have been so gross that only the clearest proof of contributory negligence equally gross could have saved defendant. Even independently of the violation of its own express rule, the case would then have fallen under the domination of a well-considered line of authorities which hold, in substance, that passengers crossing a track at a station to leave or get on a train halted for that purpose, are not held to the exercise of the same care and vigilance which are ordinarily exacted from persons crossing railroad tracks, but are authorized to assume that the railroad corporation will so regulate its trains that he will be safe from harm on the track which he is thus invited and required to cross in order to secure his passage. *Terry vs. Jewett*, 78 N. Y., 314; *Brassell vs. R. R.*, 84 N. Y., 241; *Klein vs. Jewett*, 26 N. J. Eq., 474; *Jewett vs. Klein*, 27 id., 551.

But, in the instant case, the evidence makes it clear that the ingoing train had completed its stop, and was actually moving on before the outgoing train was near, and that the latter was, therefore, not required to halt under the letter or spirit of the rule, but had the right to assume that the operation of receiving and discharging passengers had been completed and that it might safely pass.

Weeks, tutrix, vs. Railroad Company.

In point of fact, the engine of the outgoing train passed the last car of the incoming train at a point considerably beyond Napoleon street, both trains being entirely clear of the crossing, and at this point the boy was injured.

So far as appears from the evidence the operation of receiving and discharging passengers was completed and the track was clear until this crowd of boys came running from the base ball ground to board the moving train and crossed or occupied the track in front of the outgoing train and so little in advance of it that it is doubtful whether it could have been stopped in time to avoid the accident.

The evidence on the last point is contradictory but even granting that the boys were on the track when the outgoing train was further off, yet the officers of the latter might well have assumed that they would succeed in boarding the other train or otherwise get out of the way in time; and, in point of fact, all actually did so except young Weeks.

Although the petition alleges that the spot where the boy was hurt was where "the trains usually *stopped* for Loeper's Park," yet there is some effort to show that the trains were in the habit of *slowing up*, without stopping, for the purpose of receiving or discharging passengers at the base ball green, and that, therefore, the boys, in thus boarding the moving train, were acting on the invitation of defendant and thus stood under its protection.

We have examined the evidence on this point with great care, and far from establishing such custom or habit, it very clearly establishes that when the train had passengers to receive or discharge either for the green or the park, it stopped, and that its stopping place was Loeper's Park gate, which, on Sundays and picnic days, was a regular stopping place and, on other days, was a signal station where it stopped when signalled. No doubt boys from the green did sometimes jump on or off the train as it moved slowly away from or up to its stopping place at the gate; but this was not by invitation of the company which stopped its trains for the purpose of receiving or discharging passengers at this point and had the right to expect that such passengers would board or leave the train while thus halted. On this occasion the train undoubtedly did stop and ample opportunity was afforded Weeks to take his passage in a lawful and proper manner.

We need not discuss other features of negligence charged against the defendant, deeming it sufficient to show that at the time of the accident Weeks was not in the position which he occupied under any circumstances which made defendant the guarantor of his safety or

exempted him from the obligation of using proper care for his self-protection.

II.

This brings us to the question of contributory negligence.

The boy Weeks was attempting to board a moving train, which is universally recognized as a negligent and indiscreet act, constituting such contributory negligence as will debar him from recovering for injury received while so engaged. Wood's Railway Law, 1155; Knight vs. Railroad, 23 Ann. 462; Phillips vs. Railroad, 49 N. Y., 177; Railroad Company vs. Scales, 90 Ill., 586.

In addition to this, he was upon or in dangerous proximity to a railroad track in a position which, the authorities universally agree, threw upon him the duty of looking and listening and using all his senses to discover and avoid the danger necessarily incident to such a situation.

Said the Supreme Court of the United States in a case much more favorable to the injured party than this: "The failure of the engineer to ring the bell or sound the whistle, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precautions for her safety. Negligence of the company's employees was no excuse for negligence on her part. She was bound to listen or to look before attempting to cross the track, in order to avoid an approaching train, and not walk carelessly into the face of possible danger. Had she used her senses she could not have failed by them to hear and see the train which was coming. If she made use of them and walked thoughtlessly on the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain. If, using them, she saw the train coming, and yet undertook to cross the track instead of waiting for the train to pass, and was injured, the consequence of her mistake and temerity cannot be cast upon the defendant. No railroad can be held for failure of that kind. If one chooses, in such a position, to take risks, he must bear the consequences of failure. Railroad Co. vs. Houston, 95 U. S. 701; 2 Wood's Railroad Law, 1302 to 1324, and cases there cited; Houston vs. Railroad Co., 39 Ann. 796.

Now, in the instant case, Weeks was not merely crossing but standing on a track in full view of a nearly approaching train, which rang its bell and sounded its whistle. Everybody else saw the train and heard its signals, and with the slightest use of his own senses he might and should have done so. His failure was attributable solely to his eager absorption in the performance of an act in itself improper, indiscreet and negligent.

Davies vs. City of New Orleans.

Under such circumstances it is impossible to absolve him from the charge of gross contributory negligence and to cast upon the defendant the consequence of his own fault.

It is, therefore, ordered, adjudged and decreed that the verdict and judgment appealed from be annulled, avoided and reversed, and that there now be judgment in favor of defendant and rejecting plaintiff's demand at her cost in both courts.

No. 10,175.

MARY L. DAVIES VS. CITY OF NEW ORLEANS.

It is the duty of the City Council, as soon as it is practicable, to adopt some plan for draining the entire area of the city of New Orleans, and keeping it free from rain, river and storm water; but the expense of such a system of drainage must be provided for by a local assessment imposed on the property drained.

It is also made the duty of the Council to maintain the cleanliness and health of the city, and to this end they are required to adopt some efficient mode of draining the streets, and of keeping them open and free from obstructions, and of keeping the canals clean and in good repair. But the expense of the same must be raised by *ad valorem* taxation.

One involves a question of local improvement and assessment, and the other of the exercise of the police power in the administration of city affairs.

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

W. S. Benedict for Plaintiff and Appellant:

Where a public corporation ratifies the tortious acts of its agents, it will be liable therefor.—*McGary vs. Lafayette*, 4 Ann. 440; *McGary vs. Lafayette*, 12 Rob. 668; 12 Ann. 15; 13 Ann. 426.

The right of eminent domain is limited to the actual necessities of the case. *Wood's Field on Corporations*, 2d edition, sec. 403.

A municipal corporation is responsible for the damage caused by the change of grade of streets, and for its work negligently and unskillfully done, to the injury of others. *Dillon on Municipal Corporations*, 2d edition, vol. 22, pp. 969, 970, secs. 968, 993, 1011, 1036.

A municipal corporation cannot by its acts rendering property useless, refuse to indemnify the owner, and yet tax the property as if of value. Same authorities.

Francis B. Lee, Assistant City Attorney, for Defendant and Appellee:

1. Municipal corporations cannot be compelled by mandamus to establish throughout the corporate limits, nor in any part thereof, systems of street and sidewalk lighting and improvement, and drainage or sewerage; nor can they be held responsible in damages for failing to establish such systems. The inauguration of such enterprises is exclusively within the judicial or quasi-judicial or rather legislative discretion of the municipal authorities, and not subject to control. *Dillon on Municipal Corporations*, secs. 686, 1046, *et seq.*, and notes.
2. Municipal corporations are not responsible for the non-execution of their ordinances, unless there be in existence a statute declaring such liability, or unless there be a valid contract creating it. *Dillon*, sec. 950.

The opinion of the Court was delivered by

WATKINS, J. Alleging herself to be the owner of several squares of ground situated in the sixth municipal district of the city of New Orleans, the plaintiff complains that same are annually assessed for taxes, notwithstanding they derive no corresponding benefits in the way of drainage, lights, police protection, sidewalks or bridges—all of which it is the duty of the defendant to furnish.

She represents that "some time since," the city caused a ditch to be dug at the distance of one square from the front of her property, which is at all times filled with water, which overflows its banks and floods her land, and renders it valueless for any purpose whatsoever. She further avers that the work performed in the construction of said ditch was so carelessly and unskillfully done that the damage complained of was caused, and which she estimates at \$3,000.

She prays judgment for damages, and for a decree directing the city to perform her duty in the premises, and "to make the proper bridges, open the necessary canals, and do such other work, in connection with said property, as, under the law and the facts presented may be proper."

The answer of defendant is a general denial, coupled with a plea of no cause of action. There was a judgment in favor of the city and the plaintiff has appealed.

The facts appear to be as follows, to wit:

The plaintiff became the purchaser of the squares of ground mentioned, in July 1885, for the price of \$415.50 and instituted this suit in the following December. They are unimproved and unoccupied. In 1884 they were assessed for the aggregate sum of \$2400, and in 1885 for the sum of \$2600; but no part of the taxes have been paid, by either plaintiff or her vendors. They are situated between two contiguous and parallel streets, Delachaise and Amelia, which extend at right angles with Dryades street. These squares lie, one in the rear of the other, No. 507 being in front, and fronting on St. Dennis street, it being just one square from Dryades street. The ditch of which the plaintiff complains was constructed in the street last named, and extends from General Taylor street to Louisiana Avenue. The evidence fails to disclose at what time this ditch was dug, or by whom the work was performed; nor does it appear whether the work was skillfully or negligently performed. There is an accumulation of water from which three or four of the squares, on the front end of the column of squares, are flooded at some times, and which are, at all times, rendered wholly unsuited for the purposes of building, improvement or occupancy.

This water, in much the greater part, flows through other canals from the ice-works into the Dryades street ditch, and the remainder is rain water.

It appears that if Delachaise and Amelia streets were ditched, and the ditches kept open and free from obstructions, there would be a free passage-way for the surplus of water into the Claiborne drainage canal.

There was introduced in evidence an ordinance of the City Council which directed the opening of ditches in those streets named, with the view of establishing a connection between Dryades street ditch and the Claiborne drainage canal. But it was adopted in 1884—nearly one year prior to plaintiff's purchase of the property—and it does not appear why same has not been enforced.

This evidence not only does not sustain plaintiff's demand for damages, but it clearly shows that she is not entitled to any.

The precise condition of things existing when she brought this suit, existed at the date of her acquisition of the property, and had, theretofore, existed for many years. It is perfectly obvious that, in its present condition, plaintiff's property requires neither banquettes, electric lighting, nor police protection. It may well be that these vacant squares of ground are in need of drainage and bridges, quite as much as they require dwellings and inhabitants, but it is not more the duty of the defendant to furnish the former, in the manner proposed, than it is the latter.

It may well be that the City Council should inaugurate some appropriate system of drainage, whereby those properties, and others similarly situated, might be reclaimed and made habitable.

The law provides that "it shall be the duty of the Council, as soon as practicable, to adopt a plan for the thorough draining and keeping dry, and free from river water, and the rapid carrying off of rain and storm water, for the entire area of the city of New Orleans; in adopting such plan of drainage, the Council shall impose a specific assessment for local improvements, not exceeding the increase in value of the property drained, occasioned by the drainage." Section 43 of Act 20 of 1882, which provides a charter for the city of New Orleans.

This power is altogether different from the one that is conferred by Sec. 7 of that act; *i. e.*, "to maintain the *cleanliness and health* of the city, and to this end to adopt and provide an efficient system of drainage, * * * to open and keep open and free from obstructions all streets, * * * and to keep the street crossings, bridges and canals *clean and in repair.*"

State ex rel. Schlater vs. Judge.

It is the former and not the latter power which the petitioner, inferentially, invokes. It is a question, purely and simply, of *drainage*, and not of police or of administration.

Its exercise must appertain to the *entire area* of the city, and necessarily involves the adoption of some plan for the draining of rain, river and storm water. This is in the nature of a local improvement, and the expense must be borne by the property drained; and it must be apportioned by a specific assessment, which shall not exceed in amount the increase in value given to the property. 2 Dillon Munic. Corp., sec. 596; 38 Ann. 326, Charnock vs. Levee Company.

The means must be provided by taxation to enable the city authorities "to maintain the *cleanliness and health* of the city;" and to do this, they are required to keep the streets free from obstructions, and the canals *clean* and in repair.

It is perfectly clear to our minds that the plaintiff's pretensions are groundless. She has evidently sought the aid of the courts with the expectation of making a successful venture of a speculation, and has failed.

Judgment affirmed.

No. 10,217.

STATE OF LOUISIANA EX REL. R. W. SCHLATER VS. JUDGE OF THE
TWENTY-THIRD DISTRICT COURT, PARISH OF IBERVILLE.

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105	876

A bill of exceptions is only necessary for the purpose of disclosing to the appellate court what the judge's ruling was, and the grounds of objection thereto. If they appear of record, the right of the party excepting is fully preserved without the retention of a bill.

APPPLICATION for Mandamus.

Samuel Matthews and *Chas. O. Lauve* for the Relator.

Geo. Wailes, *Alex. Hébert* and *R. N. Sims* for the Respondent.

The opinion of the Court was delivered by

WATKINS, J. During the progress of proceedings in a suit pending in the respondent's court, in which the relatrix is plaintiff, and A. Wilbert & Sons are defendants, counsel of the former caused an amended petition to be filed, which on objection urged by counsel of the latter, was stricken from the record. To the respondent's ruling counsel for relatrix excepted, and tendered a bill of exceptions, which the former declined to sign, and the latter has applied for a mandamus to compel him to sign said bill.

Curley, tutrix, vs. Railroad Company.

The respondent returns that there is no rule of our practice which requires him to sign a bill of exceptions in case all the proceedings are of record, and a note of them appears in the minutes of the court. He has annexed to his answer a copy of the minutes for the purpose of showing that all of the proceedings are of record, and that the rights of the relatrix will be perfectly protected in the event of an appeal.

In thus ruling the respondent was certainly correct.

The provisions of the Code of Practice on this subject are, that "if one of the parties calls on the court to express an opinion on a point of law arising in the cause, such opinion may be excepted to." Art. 487.

And that "the party excepting to the opinion of the court must draw a bill of exceptions in which the question of fact, or of law, on which such opinion has been demanded, shall be concisely set forth, as well as the grounds of the exception so taken." Art. 488.

In construing these articles, this Court said in *State ex rel. Gaines vs. Judge*, 12 Ann. 113, that "the object of a bill of exceptions is to place on the record, and make part thereof, something which was done under the order of the court during the progress of the cause, which would not otherwise appear, in order that the question of law arising from the ruling of the judge, in the matter excepted to, may be reviewed by the appellate court."

It is obvious, then, that the Code only contemplates that a bill of exceptions should be signed and filed in the record when it is necessary to *disclose* to the appellate tribunal what the judge's ruling was, and what was the ground of objection thereto. *Harrison vs. Waymouth*, 3 R. 341; *Commissioners vs. Yorke*, 4 Ann. 138; *Scott vs. Lawson*, 10 Ann. 547.

In the instant case there was no necessity for a bill of exceptions to have been retained, as it fully appears from the record what the judge's ruling was, and also, what was the objection thereto; hence the application of the relatrix must be refused.

It is therefore ordered and decreed that the preliminary writ be set aside, and that a peremptory *mandamus* be refused, at the cost of the relatrix.

No. 10,190.

BRIDGET CURLEY, INDIVIDUALLY AND AS TUTRIX, VS. ILLINOIS CENTRAL RAILROAD COMPANY.

A railroad company, running and operating its road through the streets of a populous city, is bound to observe extraordinary precautions for the safety of the public, particularly at street crossings.

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Curley,atrix, vs. Railroad Company.

Where these precautions are omitted by the company, and a party is injured and there is no concurrent contributory negligence on his part, the company will be held liable.

A PPEAL from the Civil District Court for the Parish of Orleans.
Voorhies, J.

B. R. Forman for Plaintiff and Appellee :

1. A railway company is to be held to the exercise of a very high degree of care in operating its road through the populous streets of a city, and will not be permitted to omit with impunity any reasonable duty that may tend to the safety of the public, which has an equal right with the railroad company to the full use of the thoroughfares. *C. P. Q. R. R. vs. Stumps*, 69 Ills. 409.
2. The Illinois Central Railroad Company, acting as the successor of the New Orleans, Jackson and Great Northern Railroad Company, is bound, while running trains over their track on St. Joseph street :
 - (a) to keep the engine in front of the train while in motion ;
 - (b) to place watchman with a red lantern or signal flag at each street crossing while the train is in motion, and to have similar lights attached to each side of the train when run during the night. Ordinance No. 1031, Administration Series, A. D. 1871, and Ordinance No. 2340.
3. The surviving children or widow may recover the damages sustained by them by the death of the deceased father and husband, as well as the damages which he himself could have recovered. *C. C. 2315*, as amended by Act No. 71 of 1884, p. 94.

Girault Farrar for Defendant and Appellant :

1. When one approaches a point upon the highway, where a railway track is crossed upon the same level, it is his plain duty to proceed with caution, and if he attempts to cross the track, either on foot or in a vehicle of any description, he must use what the law says is ordinary care under the circumstances. *Beach on Contributory Negligence*, p. 191, and authorities; *Rorer on Railroads*, Vol. II, p. 1081, and authorities cited; 95 U. S. 161, *Improvement Company vs. Stead*; 33 Ann. 154, *Childs vs. Railroad*; 23 Ann. 264.
2. The law prescribes the quantum of care with great exactness. In attempting to cross, the traveler must listen for signals, notice signs put up as warnings, and look attentively up and down the track. *Beach on Contributory Negligence*, p. 192, and authorities cited; *Railroad Company vs. Houston*, 95 U. S. 697; *Railroad Company vs. Schofield*, 114 U. S. 615; *Stubley vs. London and Northwestern Railway Company*, Court of Exchequer Reports, Vol. I, p. 12.
3. He must even come to a halt for this purpose, unless it is plainly evident from his senses of sight and hearing that there is no danger. *Beach on Contributory Negligence*, pp. 192, 193, 195, and authorities; 10 Allen, 532; 29 N. Y. 315; 73 Penn. St. 504; *Reynolds vs. Hudson River R. R.*, 58 N. Y. 248.
4. Failure on the part of the railway company to do its duty will not excuse any one from using the senses of sight and hearing upon approaching a railway crossing. *Beach on Contributory Negligence*, p. 195, sec. 64; *Hinckley vs. Cape Cod R. R.*, 120 Mass. 257; *Bellefontaine, etc., R. R. Co. vs. Hunter*, 33 Ind. 335; 27 Barb. 534; *McGrath vs. N. Y. Central and Hudson River R. R. Co.*, 59 N. Y. 468.
5. The defendant was not guilty of statutory negligence in backing its train to make a coupling, in not having red lights on the end of the train, and in the fact that the brakeman did not have a red lamp instead of a white lamp on the Fulton street crossing. Ordinance 8127, *Jewell's Digest* (ed. 1887), pp. 177, 179.
6. Ordinance 8127 defines the rights and duties of defendant and its immediate author of title, on St. Joseph street, and other streets named, *in hæc verba*. This ordinance com

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- tains the express grant to use necessary switches, sidings and turn-tables. There is no restriction forbidding the backing of trains, or requiring red lights at ordinary street crossings, in this ordinance, express or implied. See *Port of Mobile vs. I. & N. R. R. Co.* 4 South. Rep. p. 106.
7. This defendant is not bound by the restrictions contained in the old Jackson Railroad Ordinance 1031, Jewell's Digest (ed. 1887), pp. 176, 177.
 - (a) It never agreed so to be bound, and has never operated St. Joseph street under that ordinance.
 - (b) The City Council never intended that it should be so bound.
Section 8 of Ordinance 8127 makes this defendant subject to all general rules and regulations, as to operation of trains on all streets, *e. g.*, ringing a bell at intervals from Claiborne street to river, and having flagmen at street car crossings.
Ordinance 1031 contains only special directions peculiar to St. Joseph street, and peculiar to the New Orleans, Jackson and Great Northern Railroad.
 - (c) Ordinance 1031 was a mere license to the old Jackson Railroad to use steam as motive power on St. Joseph street, and by its terms is revocable at the pleasure of the City Council; while Ordinance 8127 is a binding contract, made for a consideration, and is irrevocable in terms, so far as the city is concerned. (Secs. 10 and 4, Ordinance 8127.) By Ordinance 8127, the company might use steam or any other appropriate motive power. (Sec. 1.)
 8. Defendant was not guilty of negligence at all, under the facts of this case. It was backing its train in a lawful manner, at slow pace, to make a coupling, as it had a lawful right to do; the brakeman with his lamp was on the crossing in advance of the train, and he warned the plaintiff's husband in ample time to stop; failing in that effort, he signalled the train to stop, but it was too late.
 9. It is apparent from the evidence of plaintiff's own witnesses that Curley's failure to look about him, before crossing the track, was the proximate cause, if not the sole cause, of the collision. There was nothing to prevent his seeing the train if he had looked.
 10. It is a general and almost universal principle of law and common justice, that one cannot recover for an injury sustained, to the happening of which his own negligence has been the proximate cause, no matter whether the defendant be in fault or not. *Justice Field in Little vs. Hackett*, 116 U. S.; *Judge Black, in Penn. R. R. Co. vs. Aspell*, 23 Penn. St. 147; *Judge Cooley, in Teipel vs. Hilsendegen*, 44 Mich. 461; *Levy vs. Canal Co.*, 34 Ann. p. 180; *Weeks vs. R. R.*, 32 Ann. 615; *Schwartz vs. R. R.*, 30 Ann. 15.
 11. Absence of negligence on the part of plaintiff will never be presumed when an accident and injury occurs to him. He must show as a part of his case absence of contributory negligence. The burden is upon plaintiff. 3 Ann. 645; *Mercier vs. Carrollton R. R.*, 23 Ann. 264; 44 Mich. 461; 64 New York, 535; *Beach on Contributory Negligence*, pp. 433, 448. Some authorities deny this. *Beach*, p. 448.
 12. Even in those authorities which hold that the foregoing (11) proposition is not good law, it is well settled that if the contributory negligence of the plaintiff appears on his own showing, the court should direct a verdict. *Beach on Contributory Negligence*, p. 432, and authorities.

The opinion of the Court was delivered by

McENERY, J. Mrs. Bridget Curley sues the defendant railroad company individually and as tutrix of her minor son, Thomas G. Curley, for damages for a train colliding with a float driven by her husband, James M. Curley, who was fatally injured by the collision.

The defendant peremptorily excepts to plaintiff's action, because the

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petition discloses no cause of action whatever in favor of Mrs. Bridget Curley, individually.

Act No. 71, approved 10th July, 1884, is as follows :

"That Art. 2815 of the C. C. be amended and re-enacted so as to read as follows: Every act whatever of man that causes damages to another, obliges him by whose fault it happened to repair it. The right of this action shall survive in case of death in favor of the minor children or widow of the deceased, or either of them, and in default of these in favor of the surviving father and mother, or either of them, for the space of one year from the death. The survivors above mentioned may also recover the damages sustained by them by the death of the parent or child or husband or wife, as the case may be."

This act gives to either the minor or the widow the right to sue for the alleged injury to the husband and father. The widow sues for her interest in her own right and for the interest of her minor child in her representative capacity. Both were on equal interest in the same cause of action, by inheritance, and there is a proper joinder of parties. The damages claimed resulted from one cause relating to one liability on the part of defendant.

All parties in interest are before the court, and the judgment will be final and conclusive as to all.

This same question was presented in the case of Mrs. Clairain, individually and as tutrix, vs. W. U. T. Co., 40 Ann. p. 178, and this Court held that the "claim of the widow and children of the deceased for damages was properly presented in a single suit," and "that it was better to end the controversy in the one suit than to remit the plaintiffs to two different actions." The exception was properly overruled.

The facts in this case are as follows: James M. Curley, Mike Curley, his brother, and John Welsh, were in a float, driven by James M. Curley, and when the float was going up Fulton street, and in the act of crossing St. Joseph street, it collided with a freight train of the defendant company. James M. Curley was fatally injured and died at the Charity Hospital a short time after the accident. The collision between the float and the train occurred in the city of New Orleans, about 7 o'clock in the evening, on 22d September, 1887.

Counsel for plaintiffs and defendant agree upon the following facts: That the Ill. C. R. R. Co. is the lessee for 400 years of the C., St. L. & N. O. R. R., a corporation organized under the laws of Louisiana; and that the Ill. C. R. R. Co. "stands in the shoes" of said company as to its rights, franchises and powers within said State, and to operate a railroad along St. Joseph street in the city of New Orleans. That the

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rights and franchises of the defendant company were acquired from the purchase of the N. O., J. & G. N. R. R. Co., at the foreclosure sale made by the Circuit Court of the United States in New Orleans, on the 17th day of March, 1887; and by the consolidation of the purchase of said N. O., J. & G. N. R. R. Co., with the purchase of the Miss. C. R. R. Co., and that said purchases were duly consolidated according to the laws of the State; that said consolidated company was duly chartered under the terms of Act 89 of 1878, of the General Assembly of Louisiana.

It is also agreed that the N. O., J. & G. N. R. R. Co. accepted Ordinance 1031 (A. S.), adopted August 16th, 1871, by notarial act before Andrew Hero, notary, on August 30th, 1871; and that said ordinance, with the exception of the ringing of bells on St. Joseph street, measured the rights and the duties of said company as to the operation of trains on St. Joseph street, down to the adoption of Ordinance No. 8127 (A. S.), Nov. 9th, 1882, and continued to do so, unless the latter ordinance repeals expressly or impliedly said Ordinance No. 1031.

The lease made by the C., St. L. & N. O. R. R. Co. to the Ill. C. R. R. Co. was executed and delivered on the 13th June, 1882, and the Illinois Central took charge of the railroad, including that part of the line on St. Joseph street, on 1st January, 1883.

Ordinance 1031, Administration Series, 1871, permitted the N. O., J. & G. N. R. R. Co. to run their trains over their track on St. Joseph street, to and from their depot and to the river by steam, with the following restrictions:

- 1st. That the engine used should be a smokeless dummy;
- 2d. That the engine should always be kept in front of the train while in motion;
- 3d. That a watchman, with a red lantern or signal flag, should be placed at each street crossing while the train was in motion, and similar lights should be attached to each side of the train when moving at night; and it prohibited the blowing of whistles or the ringing of bells.

Ordinance 8127, which the defendant company claims measures its rights and duties on St. Joseph street, and which does not contain any restrictions peculiar to the operations of trains on St. Joseph or any other street, provides:

- 1st. The character of the fuel to be used by the engine;
- 2d. Prohibits the company from obstructing the drainage of the streets, and commanding railroad companies to protect and maintain the same to the satisfaction of the city surveyor;

3d. For the pavement of portions of the street through which the road runs;

4th. Regulates the rate of speed and gives the said company authority to use steam or any other appropriate motive power;

5th. The manner of constructing switches, so as not to obstruct the passage of vehicles;

6th. That the road should be subject to all general rules and regulations in existence and which thereafter might be enacted by the City Council.

7. That it should maintain and have regular communication and means of traffic on said lines of railroad.

Ordinance No. 1031 was a special contract and agreement between the city of New Orleans and the N. O., J. & G. N. R. R. Co., accepted by said company in the form of a notarial act. It was a contract that accompanied all the changes in ownership, name and management of said railroad. It bound to its requirements each successive corporation unless abrogated, changed or qualified by the parties to the agreement—the city of New Orleans and the successors and representatives of the road accepting the ordinance.

Ordinance 8127 does not repeal Ordinance No. 1031, either specially or by implication. It does not change, alter or modify the essential requirements contained in the latter ordinance, for the safety of the public. The obligations that the engine shall always be kept in front of the train while moving through the city, and that a watchman with a red lantern or signal flag shall be placed at each street crossing while the train is in motion; that red lights shall be attached to each side of the train when run during the night, are still in force and rest upon the Illinois Central Railroad Company.

Ordinance No. 8127 is general in its character, and applies to all railroads operating trains within the city of New Orleans. Ordinance No. 1031 is a contract entered into with the N. O., J. & G. N. R. R. Co. with special reference to the running of trains on St. Joseph street. The contract is irrevocable, until changed in some legal manner—binding on all parties to it. We are unable to see wherein it has been changed so as to leave the defendant company free to operate its trains exclusively under the provisions of Ordinance 8127. The defendant company claims that its responsibilities are measured by this enactment—and in its construction of this statutory law it totally neglected to comply with the requirements of Ordinance 1031.

The engine was not in front of the train. It had no red lights on its train, or watchman with a red light at the crossing on St. Joseph

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street. There were only white lights when any were visible. No witness says he saw a red light. The witness Cary, who says he was at the crossing and flagged the float, states he had a white light. The electric light was burning at the crossing, and under this light a white one could, if seen, be scarcely recognized from the flashes of the electric light.

The train consisted of ten cars, one engine and tender. It had a crew of three men—one brakeman, a fireman and engineer. The train was insufficiently manned. The evidence further discloses the fact that there were usually with the crew two flag boys, but at the time this accident occurred it does not appear that there was even one boy at the crossing, for the defendant attempts to show that Cary, the brakeman, was at the crossing and flagged the float. It was no compliance with the ordinance to place a boy at the crossing. It says a watchman shall be stationed at each crossing. It contemplates that a man of mature years and judgment should be charged with the responsible duty of warning the public of danger at the crossings.

We do not intend to intimate that the defendant company's responsibility is fixed and measured exclusively by statute. It is now a well recognized doctrine that railroad companies are required to exercise extraordinary precautions for the protection of the public in the management of their trains running through the streets of a populous city. It is negligence to omit any reasonable duty necessary for the safety of the public, particularly at crossings where there are frequent passage and traffic. Independent, therefore, of the ordinance referred to, the defendant was bound to use the same degree of precaution as is found in the provisions of that ordinance. They are reasonable, and the only excuse, as railroad companies, it is presumed, do not inflict wanton injuries for not strictly observing them, is a false system of economy.

Was there a want of reasonable care upon the part of James M. Curley which concurred with the negligence of defendant to cause the accident?

He was a sober, industrious, prudent and careful man. He had often crossed St. Joseph street with his float, although witnesses for defendant say sometimes they had to stop the train for him.

There were two men on the float with him. Their testimony is that they never saw the train until it was on them. The engineer states that he stopped the train in a few seconds. He stopped it when flagged to do so. The train pushed the float along the track for some distance—not exactly stated by witnesses. The train must have been within

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a very short distance of the float, within a few feet, when the engineer received the signal to stop. It is not reasonable to suppose that any sane man would drive on a track with a train so near that to attempt to cross would inevitably result in an accident.

James Curley was going up Fulton street. He could have seen the train as it passed under the electric light and went forward on the main track. It may then have reached its destination and commenced to back about the time he reached the crossing. He had, we think, reason to believe that the track was clear; that the train had passed on, and that he could pass with safety; and he had no knowledge of its again returning on the main track. There were no lights to give warning of the approach of a train. There was no watchman or flagman at the crossing. He was bound to use his sight and hearing, and ordinary prudence. The men on the float with him were placed in the same position. Neither of them saw a train, flagman, lights, or any evidence that a train was near. Curley may have looked, but there were no lights to warn him of the proximity of the train. He may have listened, and yet not heard the train. The train was being made up. At one instant it may have been going from him, at another it may have been approaching him. The train was going slow, so was the float. It was moving noiselessly, because it approached the men on the float and was on them before they were aware of the danger.

There is no evidence that the bell was ringing continuously. John Freret, the fireman, defendant's witness, says: "I generally gave the bell a tap on crossing the street." In answer to the question whether he always rang the bell in obedience to the company's regulations, he says: "I do; but sometimes I have to go in front, I mean out on front, of the engine."

James Curley approached the crossing where he had been in the course of his business in the habit of crossing. There was an invitation and inducement for him to cross, because there were no means employed by the defendant company to warn him of the vicinity of a train, and there were no indications at the time he attempted to cross that any train was approaching.

We therefore conclude that the defendant company was solely responsible for the accident, and that there was no contributory negligence on the part of the deceased, James M. Curley.

We are of the opinion that the damages allowed by the jury are excessive. It is therefore ordered and decreed that the verdict and judgment appealed from be amended by reducing the principal thereof to seven thousand dollars; and that as amended it be affirmed, and plaintiffs to pay costs of appeal.

State ex rel Levy & Son vs. Judge.

No. 10,250.

THE STATE EX REL. J. K. LEVY & SON vs. T. C. W. ELLIS, JUDGE
OF CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS, DIVI-
SION A.

A prohibition cannot issue to a District Judge to prevent him from doing an act which he denies to have done, which he refuses to do and which is not shown to have been done by him.

A judgment or decree appointing a provisional syndic, in an insolvency proceeding, cannot be suspensively appealed from. It must be executed, although an appeal was granted from it and was perfected.

A mandamus does not lie against a District Judge to direct him to annul such appointment and to cancel the letters issued to the provisional syndic, when for reasons assigned, the judge has declined to do so.

The exercise of a legal discretion cannot be controlled by mandamus.

A PPLICATION for Mandamus.

H. C. Cage for the Relators.

Bayne, Denegre & Bayne for the Respondent.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is an application for a Prohibition and for a *Mandamus*.

The relators complain that the district judge has proceeded to execute a judgment after a suspensive appeal had been taken therefrom, and that he has refused to cancel what has been thus done.

The district judge returns denying emphatically having acted in the manner complained of, after the appeal had been allowed, and avers that what was done took place after the judgment had been signed, but *before* the appeal had been asked.

He further returns that the reason for which he declined avoiding what had been thus done by him, is that, after the appeal had been granted and perfected, he ceased to have any further jurisdiction over the case, and could legally render no valid order in the premises.

It appears that the relators applied for a respite which, after due proceedings, was granted them; that certain creditors obtained orders requiring the applicants to furnish bond and security as concerned them, which have not been appealed from; that subsequently the applicants, having failed to comply with such orders, under proper proceedings, the judgment according the respite was annulled and a judgment of cession of property was rendered against the applicants, appointing a provisional syndic; that, after said judgment had been

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State ex rel. Levy & Son vs. Judge.

signed, letters were issued to the syndic, and that subsequently, a suspensive appeal was asked, granted and perfected from said judgment.

It also appears that the provisional syndic thus appointed, treating his appointment as operative, entered an appearance in the United States Circuit Court, sitting in this city, in his official capacity, in a matter in which the creditors of the applicants had an interest, and that the petitioners then took a rule in the court below to rescind the letters issued to the syndic, and that the district judge declined to act, as having no further jurisdiction over the subject-matter, in consequence of the suspensive appeal.

The prohibition asked is to prevent the judge from executing the judgment appealed from, and the *mandamus* prayed for has for its object to compel the judge to annul the letters issued to the syndic.

As it is clear that the district judge has not only not done any act after the appeal had been perfected, but has refused to do any, the Court is at a loss to perceive how the writs asked can be allowed. It would have been immaterial if the letters had issued after the appeal, as the judgment was provisionally executory.

It is also apparent that, if the execution of the judgment decreeing a cession could have been suspended by appeal, such is not the case however as to the appointment of the provisional syndic, which was made under Art. R. C. C. 3093, and Act 134 of 1888.

The Code of Practice distinctly provides that some judgments are executed provisionally, although an appeal has been taken from the same, within the delay prescribed and the necessary surety given. Such judgments relate:

- 1st. To the appointment of tutors, etc.;
- 2d. To the appointment of syndics, where the Court orders that they shall administer provisionally. C. P. 580. The jurisprudence is in accord.

The relators seem to act under the theory that the judgment appointing the provisional syndic could be suspensively appealed from, but this is a manifest error.

It is therefore ordered that the restraining order herein made *in limine* be rescinded, and that the applications for writs of prohibition and *mandamus* herein be refused, at cost of relators.

Fisk et al. vs. National Bank et als.

No. 9984.

F. M. FISK ET AL. VS. GERMANIA NATIONAL BANK ET ALS.

This case hinges mainly on questions of fact.

It was sought to hold the defendant bank liable for the contents of a bank-box for wrongfully delivering the box, and to recover from Ringrose and Washburn the contents of said box, amounting to \$100,000, which they are charged with having appropriated.

Held: the bank, having delivered the box to the bearer of the ticket or card which called for the delivery of the box to "Bearer," had legally complied with the contract, and was therefore exonerated from all responsibility in the premises.

Held: as to Ringrose and Washburn, the evidence having entirely failed to show that the box in suit contained any money or values, as alleged by plaintiffs, or to connect either of these two defendants with any spoliation of that or any other box belonging to the succession of Fisk, no recovery could be had as against them.

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

Gus. A. Breaux, Posey & Ker and W. R. Richardson for Plaintiffs and Appellants.

Braughn, Buck, Dinkelspiel & Hart, H. E. Upton and A. J. Murphy for Defendants and Appellees.

The opinion of the Court was delivered by

POCHÉ, J. Plaintiffs in this case are the widow and the son of F. M. Risk, who died in this city in December, 1874.

They instituted this suit in December, 1884, for the recovery of the contents of a bank-box, which, they alleged, had been deposited by the deceased in the Germania Bank, whence it was taken out by two of the defendants, Anne Conery and W. B. Ringrose, and rifled of its contents, which were appropriated by Ringrose and the other co-defendant, W. W. Washburn.

They alleged that the contents of said box consisted of money and of securities worth in the aggregate one hundred thousand dollars, for which they asked judgment against the four defendants *in solido*.

They appeal from a judgment which rejected their demand.

The defendants interposed numerous pleas in defense, which may be summarized into a general denial and the plea of prescription of one and ten years.

Plaintiffs' theory of their case is substantially as follows: The deceased, Fisk, who was a thrifty and wealthy man, was divorced from his wife, who obtained in the same proceedings a judgment against him for her share of the community property, which amounted in 1871 to more than \$150,000, consisting mainly of immovable property.

To avert the seizure of any of that property by his wife, Fisk proceeded to remove it beyond her reach through various devices, one of which was to convert most of it into cash and negotiable securities. He kept but a small bank account, and enclosed the bulk of his money and valuables in a bank-box, which was deposited in the defendant bank, and which was marked in the name of Anne Conery, one of the defendants herein, with whom he lived in open concubinage, occupying the same house, for nearly twenty years. As the greater part of his moneyed transactions were carried on in the name of "Anne Conery," he held her general and special power of attorney, under which he dealt with all matters, property, money and values which stood in her name, and by virtue of which, together with the deposit ticket or card, he called for and took out of the bank as often as he desired the box therein deposited in her name, and as her property.

It is then contended that, at the time of his death, the box contained some \$70,000 in currency, \$35,000 in bonds and other negotiable securities, besides jewelry and other small effects of value; and that with the ticket of deposit which Anne Conery abstracted from the person of Fisk, as he lay unconscious at the approach of death, on the day before his demise, the box was taken out of the bank by Ringrose, who stole the money which it contained; the bonds being appropriated by Washburn, one of the conspirators, who had been appointed executor of Fisk's estate through an olographic will which had been taken out of the bank-box by Ringrose, and by the latter handed to Anne Conery the universal legatee under the will, which she delivered to Washburn.

Washburn's administration of the estate was soon brought to an end through a subsequent will of the deceased, under the effect of which one of his daughters became executrix, and thereafter administered the succession through Washburn as her instituted agent.

The succession, thus administered, amounted to something over \$46,000, of which the widow and heirs were in due course placed in possession. Thus the controversy is restricted to the alleged contents of the bank-box.

It is argued that the difference between the inventoried value of the community in 1871, and the amount of property left by Fisk at his death, was represented by the money and bonds which the bank-box contained at the time of his death; and which were appropriated by Ringrose and Washburn a few days after his death.

As could be naturally expected in a trial which took place some twelve years after the occurrence of the alleged events and incidents which form the basis of the suit, the evidence, which fills up an im-

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mense record, is decidedly conflicting, having imposed on the Court tedious and painful labor to reach a satisfactory analysis thereof.

And we leave the record with the clear conviction that the case is entirely with the defendants.

As it turned out during the trial that the testimony of Anne Conery was the main prop of plaintiffs' case, it follows naturally that they do not press their claim, and that they are not clamorous for a judgment, against her.

Their attack will therefore be considered as being levelled exclusively against the three other defendants.

I.

Their right of recovery against the bank is predicated on its alleged violation of a contract of deposit. But, according to plaintiffs' own evidence, it appears conclusively that there was no contract of deposit between the bank and Fisk, in his own right. Avowedly, the box which is the subject-matter of this litigation bore the name and was deposited as the property of "Anne Conery, 157 Camp street, N. O.," and the card which evidenced the contract entitled the bearer thereof to call for, and to obtain possession of, the box deposited in the bank in the name of "Anne Conery." And the record shows that Fisk always obtained the box on presentation, and as the bearer, of the card in question, which was always kept by the bank until the box was returned.

Now, it is conceded that the last and final delivery of the box was obtained by the bearer, and on presentation, of that identical card.

Wherein, then, did the bank violate its contract touching that box?

The avowed object of the device or scheme was to hold out Anne Conery as the true owner of the box and contents, so as to screen either from the reach and action of the divorced wife. And if it had happened that in any proceeding by the wife the bank had delivered the box as the property of Fisk, how clamorous would Anne Conery, instigated by him, have been in holding the bank responsible for a violation of its contract by an illegal and wrongful delivery of the box.

Article 2949 of the Civil Code, which plaintiffs invoke as fixing the liability of the bank, reads as follows:

"The depositary must restore the thing deposited only to him who delivered it, or in whose name the deposit was made, or who was pointed out to receive it."

This is precisely what was done by the bank in the premises. The box had been deposited in the name of "Anne Conery," and the party pointed out to receive it was the bearer of the card issued in her name.

As often as Fisk obtained possession of the box, and the record shows that it occurred almost every day for four years, it was in that capacity that he obtained it; the same means which Ringrose used in December, 1874. The fact that between Fisk and Anne Conery the box was truly and exclusively the property of Fisk, and that in point of fact he always held and constantly carried on his person the card which evidenced the contract of deposit, was of no concern to the bank, and cannot alter, vary, modify or increase the responsibility of the bank touching the box, which it was bound to deliver to the bearer on presentation of the card. The bank, therefore, stands entirely exonerated from any liability in the premises. That conclusion is practically conceded by one of the plaintiffs, who says in one part of his testimony: "As far as the bank is concerned, I did not think there was any conspiracy. I don't see why there should be."

II.

The theory as to the liability of the defendant Washburn is predicated on three circumstances:

1st. That the box marked "Anne Conery," and numbered as "33," alleged to contain \$100,000 in money and values, was found in his possession some ten years later, when it was returned and delivered by him to one of the plaintiffs herein.

2d. That a short time after the death of Fisk, he converted city gold bonds, of the kind alleged to be in the box, amounting to some \$35,000, into premium bonds.

3d. That as executor, and as the agent of the executrix, he entirely failed to make any effort, or to institute any search for the recovery of the box, the previous existence and the missing of which had been made known to him at the time.

Before entering into a discussion of these three grounds of suspicion, and which at most amount to nothing else, it is but fair and proper to premise here the declaration of the entire failure of plaintiffs to have shown that Fisk had possession, at the time of his death, of money or securities, contained in the box in question, or anywhere else, in an amount equal to or approximating the sum which plaintiffs claim in this suit.

It would serve no useful purpose, either in justice or in jurisprudence, to analyze, in this opinion, the testimony which bears on this point. It is sufficient to announce our conclusions on the subject, and it is better to omit the publication of our views as to the insufficiency of any part of the testimony, or touching the veracity *vel non* of any of the witnesses in the case.

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But conceding, *arguendo*, that there was such a box containing the great values which plaintiffs describe, we find no reason in the record to justify the assertion that Washburn had any knowledge thereof, or any connection therewith.

1st. The evidence shows that the trunk and tin boxes which Washburn turned over to F. M. Fisk, Jr., in 1884, had been brought to his place of business some ten years before, when he represented the executrix, and that neither of them contained the values in question. And on the point that "Box 33," described by some of the witnesses as containing Fisk's treasures, was handled by Washburn, the evidence is not satisfactory that the identical box had ever been in Washburn's possession. Can it be supposed for one moment that he would at any time be so stupid as to turn over to one of the heirs the identical box which he had participated in despoiling ten years before, and for which diligent search had been instituted, including the arrest of Anne Connery—and in the absence of any demand for the same?

Much more natural and much easier and safer would it have been to have destroyed it, or to have made it otherwise disappear forever.

2d. The record shows Washburn to be, and to have been at the time, a man of means, and to have then speculated in city securities, which he first converted into gold bonds and subsequently into premium bonds. There is nothing in the coincidence that he converted his bonds at about the time that the succession of Fisk was in course of settlement.

3d. As executor, or as the agent of the executrix, he was under no obligation to do more than to administer the property which was inventoried in the succession. And it was no part of his duty to institute detective researches for any missing money or paper, unless some tangible clue had been furnished him by the heirs or other interested parties. This is hardly as much as a reasonable ground of suspicion.

III.

In so far as Ringrose is connected with the alleged appropriation of money, we refer to what was said above as to the absence of legal or satisfactory proof of the existence of the money at all, as the property of Fisk, and this is the essential prerequisite to any recovery against him.

It appears from the record that his only connection with the succession, or with any property belonging thereto, or connected therewith, was as the messenger or friend of Anne Connery, at whose request he called for and withdrew a certain bank-box which had been deposited at the bank in her name; but the evidence entirely fails to show that

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the particular box in question contained any money or valuables belonging to Fisk or anybody else. The box was claimed as her property by Anne Conery, who subsequently pledged its contents, some silver-ware and other like effects, to secure a loan of money. At her request he placed the box in the custody of Father Allen, a near neighbor, from whom he brought it back to Anne Conery a few days later. But, we repeat, the record is barren of evidence showing that the box contained money or securities such as plaintiffs' claim covers. We have carefully weighed all the testimony on this point, and we find no grounds to justify even a suspicion that the defendant Ringrose committed the crime of larceny, which is practically the substance of the charge herein made against him.

We therefore conclude, with the district judge, that the defense is clearly made out.

Under these views we see no necessity to discuss the plea of prescription.

Judgment affirmed.

No. 10,201.

RICHARD J. LOWDEN VS. RICHARD L. ROBERTSON, JR.

In sequestration of movable property based on a vendor's privilege, an affidavit to the debt, to the privilege, and to the fear that "the defendant will conceal, part with or dispose of the movable in his possession during the pendency of the suit," fills all the requirements of the law; and the party is not bound to swear to, or to prove, any other grounds of fear than the simple facts that he has a privilege and that it lies in the power of the defendant to defeat or destroy it by doing some of the acts which he swears he fears he may do.

The case is still stronger where the purchaser of the movable has failed to pay the price when due; which default would be a sufficient reason for the fear, even if the law required the creditor to swear and to prove that he has *good cause* to fear, which it does not.

APPPEAL from the Civil District Court for the Parish of Orleans.
Houston, J.

Hornor & Lee for Plaintiff and Appellant.

Sam'l L. Gilmore for Defendant and Appellee.

The opinion of the Court was delivered by
FENNER, J. The appeal is from an interlocutory judgment dissolving a sequestration.

The sequestration issued upon an affidavit of plaintiff that the debt claimed is due and owing; that he has a vendor's privilege upon the

40	825
47	748
47	1465
40	825
52	231
40	825
115	230

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movable sequestered; and that he "fears that the defendant will conceal, part with or dispose of the same during the pendency of the suit."

The grounds assigned in the rule to dissolve are:

1st. That the statements contained in plaintiff's affidavit are entirely unfounded and untrue.

2d. That the bond herein furnished is insufficient.

The ground first above stated is the one on which the judge *a quo* acted, and the only one urged before us. Recurring to the affidavit, the statements contained in which are charged to be untrue, we find no statements therein except those above recited.

It is not pretended that, under his rule to dissolve, the defendant has established the non-existence of either the debt or the privilege, or that the debt is not overdue.

The only remaining allegation is the one that plaintiff *fears* that defendant will conceal, part with or dispose of the property during the pendency of the suit. It would certainly be difficult to establish that such an allegation is untrue. Fear is a subjective mental condition, the existence or non-existence of which can hardly be the subject of extrinsic proof. If a man says and swears that he fears, it is, to say the least, difficult to contradict him.

But the contention is that it is not sufficient that a party has a privilege and that he fears it may be lost by some disposition of the property during the pendency of the suit, but that he is bound to establish in addition that his fear is based on such acts or declarations of defendant as would justify the fear.

If this were correct, we should not hesitate to hold that where a man has sold movable property for a price payable in notes at a fixed day, and when the purchaser fails to pay them when due, the mere fact of non-payment, coupled with the additional fact that it lies in the power of the purchaser to defeat the vendor's privilege by the alienation or removal of the thing sold, constitutes ample cause for a just and reasonable fear that his privilege may be thus defeated.

In the case of provisional seizure, the lessor is required to make affidavit "that he has *good reasons to believe* that the lessee will remove the furniture," etc. (C. P. 287); yet this Court has repeatedly held that the failure of the tenant to pay the rent when due constitutes a sufficient basis for the affidavit. *Heirs of Lalaurie vs. Woods*, 8 Ann. 366; *Wallace vs. Smith*, *Id.* 376; *Shiff vs. Ezekiel*, 23 Ann. 383; *Fox vs. McKee*, 31 Ann. 71; *Dillon vs. Porier*, 34 Ann. 1100.

The same principle applies with equal force to a vendor's privilege where the purchaser fails to pay the price when due.

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In the case of sequestration, moreover, the plaintiff is not required to swear that he has *good reasons* to fear, but simply that he *fears*. C. P. 275, No. 8.

In some earlier cases there were *dicta* to the effect that a party must not only establish his privilege and his fear that it may be lost, but also good grounds for the fear.

But in *Wells vs. St. Dizier*, 9 Ann. 119, the Court held a simple affidavit in the terms of No. 8 of Art. 275, C. P., to be sufficient; and in a later case the Court followed the same rule, making the following significant reference: "We are aware that there are other decisions which are inconsistent with the decision in *Wells vs. St. Dizier*, but prefer to abide by the doctrine of the last named case as being, in our opinion, more in conformity to the letter of the Code of Practice." *Mabry vs. Tally*, 15 Ann. 563.

Still later, it was held that an affidavit to the privilege, coupled with a statement of the fear in accordance with No. 8 of 275, C. P., was sufficient basis for sequestration. *Blanc vs. Wallace*, 26 Ann. 492.

And in the latest case, it was treated as *conceded* that "had the affidavit set forth the *fear* of a removal of the cotton (in addition to the privilege) it would have followed the exigencies of the law." *Gumbel vs. Beer*, 36 Ann. 487.

We treat it, therefore, as fully settled, in accordance with the uniform practice, that in sequestration based on a privilege (at least when the debt secured is due), an affidavit to the debt, to the privilege, and to the fear stated in No. 8 of Art. 275, C. P., is sufficient. The party is not bound to swear to or to prove any other grounds of fear than the simple facts that he has a privilege and that it lies in the power of the defendant to defeat or destroy it by doing some of the acts which he swears he fears he may do. Where the debt is not due, possibly different considerations might arise.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from be annulled and reversed; and it is now ordered and decreed that the motion to dissolve the sequestration be denied and overruled, at defendant's cost in both courts.

No. 10,070.

SUCCESSION OF HENRY CASSIDY.

Where, on the opposition to an executor's account, the same has been amended by placing the opponent thereon as a creditor of the succession then under administration, the executor in his representative capacity has an appealable interest in the judgment on the

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opposition, and if he deems it unjust has not only the right to appeal but it is his duty to do so.

If the succession funds shown by the account for distribution exceed \$2,000, this Court has jurisdiction, whatever be the amount claimed by the opponent.

A suit by an evicted purchaser against his vendor, or against the latter's vendor, for indemnity on account of the breach of the covenant of warranty, is not a real action. If the suit is brought against the succession of the vendor, the testamentary executor alone is competent to defend the action; hence it is not necessary that absent heirs be made parties.

At common law and under the laws of the State of Texas, an evicted purchaser may sue a remote vendor for recovery of his purchase price, without first exercising his recourse against his immediate vendor. Under that system "a covenant of warranty runs with the land."

In Texas a purchaser may sue his vendor for a breach of the covenant of warranty without showing eviction under legal process, but in that case the purchaser must under proper averments establish the validity of the title which he recognizes as paramount to that transferred to him by his vendor, and must show an actual dispossession by virtue thereof. The rights and obligations of the parties to a sale executed in one State, of real estate situated in another, must be determined under the laws of the State in which the property is situated.

A PPEAL from the Civil District Court for the Parish of Orleans.
Houston, J.

J. O. Nixon, Jr, for the executor, Appellant:

1. No action can be brought by a second vendor against a vendor upon a warranty, except the intermediate vendor be a party; this results from the general rule providing that all persons through whom relief is sought be made parties. See *Soixas vs King*, 39 Ann.; *Hyde vs. Craddock*, 10 R. 387.
2. The second vendee has no action of warranty against the first vendor, except there be an express subrogation. *Van Norght vs. Foreman*, 1 N. S. 352; *Davison vs. Charbro's Heirs*, 6 N. S. 321; *Smith vs. Wilson*, 11 R. 522; *Chambliss vs. Miller*, 15 Ann. 713.
3. The preponderance of evidence is that the opponents have never been evicted from the property in question; as up to the time the testimony was taken in this cause, by the admission of one of the opponents they were still rendering the land for taxation.

Farrar, Jonas & Kruttschnitt on the same side.

Merrick & Merrick for Opponents and Appellees:

The rights and obligations arising under an act passed in one State to be executed in another respecting the transfer of real estate in the latter, are regulated in point of *form, substance and validity* by the laws of the State in which such acts are to have effect. 39 Ann. 952, *Succession of Larendon*.

A party purchasing land in Texas is entitled to recover against a remote warrantor where his title has failed. Where the Supreme Court of Texas has decided that the land sold was not within a certain tract, and therefore that title thereto was in the State; and where the State surveyed the land for school and homestead purposes and sold the same to third persons, this constitutes an eviction.

Actual eviction is not necessary where superior title is shown to be in the State and the land is abandoned under the title in question. 36 Ann. 792, *Filhiol vs. Cobb*; 9 Wall 900. Warranty runs with the lands under the laws of Texas. 20 Texas, 623, *Peck vs. Hinsley*; 51 Texas, 178, *Westhope vs. Chambers*.

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ON MOTION TO DISMISS.

The opinion of the Court was delivered by

TODD, J. This is an appeal taken by an executor of a succession from a judgment rendered maintaining an opposition to his account.

There is a motion to dismiss the appeal—

1st. On the ground that the appellant (the executor) has no appealable interest;

2d. That the court has no jurisdiction *ratione materiæ*.

I.

The opposition to the account is in the nature of a suit against the succession; that is, it is a demand on the part of the opponents to compel the executor to place them on the account as creditors of the succession for a designated sum. Their demand was recognized by the court as a just one, and the account amended by placing the claim on the account and ordering its payment.

Under this state of facts the executor, as the representative of the succession under administration, had certainly, in his representative capacity, an interest to appeal in behalf of the succession; and it was his duty to do so if he believed the judgment was wrong. An executor has an interest to appeal whenever it is sought to wrest from him property belonging to the succession, or to impose a debt upon it which will diminish its assets in the fund to be distributed among the heirs or creditors; and his right to appeal exists independently of the heirs or creditors. Succession of McKenna, 23 Ann. 370; Succession of Chambury, 34 Ann. 25; Coyle vs. Succession of Creevy, *Ib.* 541.

The cases referred to in support of the motion only apply to the case of a contest of creditors over a fund in the hands of an executor or administrator for distribution, and the determination of which cannot add to or diminish the assets of the succession; as where the litigation only concerns the rights of opposing creditors to a certain fund or the right to be paid by preference out of it. In such case it is a matter of indifference to the executor which creditor succeeds, and he has no interest whatever in the judgment determining the question.

II.

The amount shown by the account to be in the hands of the executor for distribution exceeds \$2000, and this gives the Court jurisdiction.

Motion to dismiss is therefore refused.

ON THE MERITS.

WATKINS, J. The present controversy arises in the testate, and apparently solvent, succession of Henry Cassidy, a citizen and resident

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of this State, and which was opened in October, 1884. It is raised by way of an opposition to a final account. The opponents are Arthur E. Spohn and Catherine Hamilton, administratrix of the estate of Alexander Hamilton, citizens of the State of Texas.

The following are the grounds of their opposition, substantially, viz:

That on the 9th of December, 1875, the deceased, in consideration of the price of two thousand dollars, sold to Horace Wright Cassidy a tract of land situated in Neuces county, Texas, with full warranty of title to said purchaser, his heirs and assigns; and on the 11th day of July, 1878, said vendee, for and in consideration of the price of \$1822.50, sold said tract of land to Arthur E. Spohn and Dr. Alexander Hamilton, opponents herein, with like warranty of title.

That by a decision of the Supreme Court of the State of Texas, rendered in March, 1884, opponents' title to said land was declared null; and State patents have been issued to other parties, and they have been compelled to abandon it.

They aver that they were *in effect* subrogated, by their vendor, Horace Wright Cassidy, to the warranty of Henry Cassidy, "whose covenant of warranty runs with the land, under the law of the State of Texas, and should protect petitioners;" and that the succession of Henry Cassidy is liable to them under the law of the State of Texas, against which opponents are entitled to *recover* on said obligation of warranty.

That, notwithstanding their right to have their claim placed upon the final account of, and paid out of the assets of said succession, the executor has neglected and omitted same, and proposes to surrender the assets thereof to the heirs.

Wherefore they pray for an appropriate amendment of the account and judgment conformably thereto.

Horace Wright Cassidy was not made a party to the opposition; nor was the attorney for absent heirs, appointed to represent them, cited.

The defenses set up to this claim are as follows:

1st. That this claim and suit cannot be prosecuted against the succession of Cassidy without making Horace Wright Cassidy a party thereto.

2d. That there is no cause of action at all by these opponents against the succession of Henry Cassidy, because there is no privity of contract between the succession of Cassidy and these opponents, Spohn and Hamilton; and because Spohn and Hamilton were never subrogated by Horace Wright Cassidy to his action, whatever it might be, against the succession of Henry Cassidy.

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3d. That no such dispossession of the land in question, and no such conclusive conflicting title to the land in controversy, is shown as would create a legal eviction.

I.

The first question to be determined is whether this is a personal or real action.

Strictly speaking it is neither; because an opposition to an executor's account is an *answer*, and has for its object to test its correctness. The executor has not admitted or approved of opponents' claim. It would have been more regular and formal for opponents to have brought a *direct* action against the executor for the recognition and establishment of his demand. But no objection has been raised on that account. Yet, if we should find their opposition to be of the nature of a *real* action which "must be brought against the testamentary executor *and* the heirs" (C. P. 123), there would be a stronger reason why the heirs should be cited to answer it.

For if this is not a personal action, the executor has no authority to represent the heirs, and a judgment against him *alone* would not bind them. *Hart vs. Bone*. 5 La. 97; *Bird, executor, vs. Dufour, executor*, 34 Ann. 322; *Cronan vs. McDonough's Executor*, 9 Ann. 302.

The Code of Practice provides that "the obligation which one contracts to defend another in some action which may be instituted against him, is termed warranty." Art. 378.

It further declares that "warranty may be of two kinds, real or personal. Real warranty is that which arises in *real* or hypothecary actions; as when a purchaser is sued in eviction of an immovable property which has been sold him." Art. 379.

This opposition—treated *as* an action—is undoubtedly a *real* action; and, hence, the heirs of Henry Cassidy, whether present or represented, should have been cited.

The fact of the attorney for absent heirs having joined the executor's counsel in making objections to the introduction of testimony, and in insisting on his plea of no cause of action, cannot amount to such a waiver as would confer the power on the executor to stand in judgment alone.

II.

Notwithstanding the views we have expressed will necessitate the remanding the case, we feel it our duty to examine and pass upon the plea of no cause of action—the contention of the executor's counsel being that there is no privity of contract between the succession of Henry Cassidy and the opponents, they never having been subrogated

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by Horace Wright Cassidy to his right of action in warranty against Henry Cassidy.

His argument is, that unless there had been an express subrogation by Horace Wright Cassidy to Spohn and Hamilton of his action of warranty against Henry Cassidy, no action against the latter is maintainable in favor of opponents against Henry Cassidy's succession and heirs.

The Code of Practice provides that "when one is sued in eviction of an immovable property sold to him * * * he shall be entitled to a delay, in order to have his warrantor made a party to the suit," etc. Arts. 380, 387.

It further provides that "if the defendant is cast in the action, the judge, when he gives judgment against defendant, must render, at the same time, a judgment in favor of the defendant against his warrantor for whatever indemnity may be due to such defendant." Art. 385.

Hence, it would seem to be necessary, in order to avoid a circuitry of action, that the vendee should be subrogated to his vendor's right of action in warranty against his vendor.

This principle has been recognized and applied in the following cases, viz: Van Norghthon vs. Foreman, 1 N. S. 352; Davidson vs. Charber's Heirs, 6 N. S. 321; Smit vs. Wilson, 11 R. 522; Chambliss vs. Milier, 15 Ann. 713; Filhiol vs. Cobb, 36 Ann. 793.

In each of those cases it was substantially decided that the vendee who has not taken an express subrogation of his vendor's right of action in warranty, on the person from whom he bought, cannot, in case of eviction, maintain an action against the first seller.

The application of this principle in the instant case does not interfere with the control over contracts given to the *lex rei sitæ*, which was so clearly expounded in the Succession of Larendon, 39 Ann. 952.

The question here is one relating to the form and effect of an action, and not one relating to the law governing the contract. C. P. 13.

Such a question a court of this State has the unmistakable right to decide.

We are of the opinion that opponents have no right of action against the succession of Henry Cassidy, primarily. That the opponents should have litigated the question of liability with their own warrantor, Henry Wright Cassidy, and contradictorily with him established their demands, under their contract with him.

But inasmuch as the parties concerned are all heirs of the succession of Henry Cassidy, we can see no objection to its final settlement therein, after due citation, and on competent and sufficient evidence.

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It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed; and it is further ordered, adjudged and decreed that the cause be remanded to the court *a qua*, with leave to opponents to make proper parties, and that same may be, thereafter, proceeded with according to law and the views herein expressed; the cost of appeal to be taxed against the opponents and appellees, and the cost of the lower court to await final judgment thereon.

ON REHEARING.

POCHÉ, J. Our reasons for re-opening this case originated from doubts which we entertained of the correctness of our conclusions in determining the nature of the action presented in the pleadings of the opposition of Spohn and Hamilton, appellees herein.

A second examination of the question constrains us to reconsider the conclusions announced in our previous opinion.

By way of opposition to the final account of the succession of Henry Cassidy, Spohn and Hamilton, the latter therein represented by his widow and surviving partner in community, instituted an action for the recovery of the purchase money of a tract of land which they had bought from Horace Wright Cassidy in 1878, it being the same land which their said vendor had acquired from Henry Cassidy, (since deceased) in 1875; from which property they claim to have been evicted under the effect of a decision of the Supreme Court of the State of Texas, in which said lands are situated, rendered in March, 1884.

Their right of recovery was resisted on the grounds substantially:

1st. That Horace Wright Cassidy should have been made a party to their action;

2d. That opponents had no cause of action against Henry Cassidy, who was not their immediate vendor, and was not their warrantor;

3d. That opponents had not been legally evicted from the lands.

Treating the opposition as a real action, we had remanded the cause for the purpose of allowing opponents to make proper parties as contemplated by the provisions of the the last paragraph of Article 123 of the Code of Practice.

And therein lies the error of our previous decree.

Opponents' right of action being grounded on an alleged previous eviction, their demand cannot be treated as a call in warranty within the purview of Articles 378 and 379 of the Code of Practice.

It is in the nature of a demand for compensatory damages arising

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out of an eviction from property which they had purchased from the vendee of the deceased; hence it cannot be treated otherwise than as an action for the recovery of a sum of money, growing out of an alleged contract of warranty. The proper definition of its nature must therefore be controlled by the provisions of Article 12 of the Code of Practice, which are to the effect that "Actions tending to recover an immovable, or a real right, or an universality of things, such as an inheritance, are considered real; while actions for the recovery of a movable or of a sum of money, though accompanied with a mortgage, are not real actions."

The real warranty, as contemplated in Article 379 of the Code of Practice, arises only in the cases therein enumerated, in which the call in warranty partakes of the nature of a real action only in so far as it is an incident to the main demand.

But in an action to recover a sum of money in connection with a covenant of warranty after an alleged eviction of the party claiming, the immovable which was the subject-matter of the sale and of the eviction then ceases to be a factor in the controversy, and such a demand must be considered as a personal action. To that effect was the ruling of this Court in a case of great, if not absolute, similarity to the *status* of the present controversy. *Bracey vs. Calderwood*, 36 Ann. 796.

The authority of that case also affords an answer to the contention that Horace Wright Cassidy should have been made a party as the immediate vendor of opponents. The record shows that he is a resident of Texas, and it is clear that no valid judgment could have been rendered against him as a warrantor in the present action by the courts of Louisiana. And moreover, under the views hereinafter expressed, he was not a necessary party in the issues which opponents tender to the succession of Henry Cassidy.

The deceased was his vendor, and as such the latter could not urge any demand in warranty or for indemnity against his vendee. Hence it follows that for the purposes of opponents' demand against the succession of Henry Cassidy, all necessary parties were before the court, and that a valid final judgment may under the pleadings be rendered in the case. It was not necessary to that end that Horace Wright Cassidy, the absent heir, should have been made a party. The testamentary executor was competent to represent the succession in the present action. Article 123 of the Code of Practice provides as follows: "Testamentary executors may appear and defend all the actions brought against the successions they administer, when none of the heirs are present or represented in the State; but if all the heirs, or

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any one of them, be present or represented, none but personal actions can be brought against the testamentary executor alone."

We therefore conclude that this case, although presented in a very unusual form, is in such a shape as to justify us in considering its merits. This brings us to the discussion of the contested right of the opponents to sue as warrantor a remote vendor in the chain of titles without first exercising their recourse against their immediate vendor.

The sale by Henry Cassidy to Horace Wright Cassidy was executed in this State, and the deed of the latter to Spohn and Hamilton was executed in the State of Texas, and as already stated, the lands which were the subject-matter of both contracts are situated in Texas.

Hence it follows that the rights and obligations of the parties under both contracts are to be governed by the laws of Texas. This question was discussed and maturely considered in the case of the succession of Mrs. Charles A. Larendon, 39 Ann. 952, in which the rule was formulated in the following language: "The rights and obligations arising under acts passed in one State to be executed in another, respecting the transfer of *real* estate in the latter, are regulated in point of *form*, *substance* and *validity* by the laws of the State in which such acts are to have effect."

Now, under the laws and according to the jurisprudence of the State of Texas, a grantee may maintain an action and recover for breach of covenant of warranty against his immediate or remote vendor. Under that system "a covenant of warranty runs with the land." The existence and recognition of that principle in the laws and jurisprudence of Texas, in which the common law prevails, is shown by the testimony of eminent practitioners in that State, who support their conclusions by reference to authorities in point. Hobby's Texas Land Law, Sec. 37, B; Peck vs. Housley, 20 Texas Reports, p. 677. See also, Hunt vs. Anvidon, 4 Hill N. Y. p. 347; 42 Mich., Port vs. Campau; Stony vs. N. Y. Elev. R. R., 163.

We therefore hold that in this case opponents could maintain their action against Henry Cassidy their remote vendor, or his succession, without first exercising their recourse against their immediate vendor, Horace Wright Cassidy. And this was one of the reasons for which we held, in another part of this opinion, that as vendor or warrantor, the latter was not a necessary party in these proceedings.

We must now discuss the question as to whether opponents have been legally evicted or not, and that involves the consideration of two propositions:

1st. One of law, and that is whether such an eviction must neces-

Succession of Cassidy.

sarily result from direct judicial process against the alleged evicted vendee;

2d. Whether, if evicted in law, those opponents have actually abandoned the property.

I.

The negative of this proposition not only flows from competent authority on the laws and jurisprudence of Texas, but the principle is conceded in brief by the present counsel of the testamentary executor, who say: "The Texas authorities referred to by opponents . . . undoubtedly establish the fact that a purchaser may sue his vendor for a breach of the covenant of warranty without showing eviction under legal process; but they also show that, in order to recover in such action, the purchaser must plead, prove and establish the validity of the adverse title which he admits and claims to be paramount to that transferred to him by his vendor, and must show an actual dispossession by virtue thereof."

We understand both of the foregoing propositions to be correct, and to precisely express the law which governs this point of the case.

Hence, we shall now turn our attention to the question of the alleged eviction which underlies opponents' right of recovery.

II.

On this, which is the pivotal, point in the case the record discloses the following facts, substantially:

The lands which Henry Cassidy sold to his son, and which the latter subsequently transferred to Spohn and Hamilton, were represented, and are now held, as forming a part of a larger tract of land known as the Enrique Villareal grant, obtained by the latter from the Mexican State of Tamaulipas. It subsequently appeared from official surveys made under the authority of the State of Texas, that the Villareal grant did not extend as far west as the location of the Cassidy lands and of other lands held by the grantee of Villareal, and that the State authorities proceeded to survey and to dispose of those lands as belonging to the State.

A suit was then instituted by the administrator of H. L. Kinney, who owned the grant in question, against certain parties who held under the State of Texas. That litigation was settled by the Supreme Court of Texas in May, 1884, in a decision which defined the proper limits and boundaries of the Villareal grant; and which adjudicated that all lands situated west of a certain line, which was held to be the western boundary of the grant, were not embraced in, or covered by, the Villareal grant.

State ex rel. Mayer vs. Judge.

That litigation is entitled *Schæffer vs. Berry*, executor, et al., and is reported in the 62d vol. of Texas Reports, p. 705.

It is in proof in this record that the lands sold by the Cassidys are situated west of the western boundary of the Villareal grant, established by that decision; hence, they are not a part of the grant, and it follows that the title of the State of Texas and of its vendees and assignees is paramount to the title held by these opponents by means of their purchase from the Cassidys as vendees of H. L. Kinney. That state of things must be held as a legal eviction of Cassidy's purchasers.

These facts are gathered from a voluminous record, to which it is unnecessary to refer in detail.

On the question of actual abandonment, the testimony is conflicting, but the preponderance of the evidence shows that opponents have been dispossessed of, and that they have actually abandoned, the lands under the title which they had acquired from Cassidy.

The judicial declarations made by them in this action would of themselves estop them from hereafter claiming either the ownership or the possession of the lands in question as the grantees of Horace W. Cassidy.

These considerations lead us to the affirmance of the judgment rendered below, which was in favor of opponents for the amount of their purchase price paid to Horace Wright Cassidy, with interest of 5 per cent per annum from January 1, 1885. We are not disposed, and we find no reason, to favor appellees' motion for an increase of the rate of interest, and we are satisfied that the district judge has done substantial justice to the parties.

It is therefore ordered that our previous decree rendered herein be cancelled and set aside, and that the judgment appealed from be affirmed with costs.

40 837
117 645

No. 10,243.

THE STATE EX REL. D. A. MAYER VS. N. H. RIGHTOR, JUDGE OF
DIVISION D, OF CIVIL DISTRICT COURT FOR THE PARISH OF
ORLEANS.

Our supervisory power will be exercised only in cases where there has been a flagrant usurpation of authority, or when serious injury may occur to parties to whom no other remedies are afforded, or when the intermediate courts are without power to grant relief.

This Court will respect the independence of inferior courts in the determination of questions confided to their judicial discretion, and will not usurp merely appellate jurisdiction not conferred upon it by the Constitution.

State ex rel. Mayer vs. Judge.

If the case in which relief is sought be appealable, the relator has adequate remedy by appeal and is not entitled to the prohibitive authority of this Court.

A mere apprehension of injury is not, of itself, sufficient to justify the interference of this Court with the proceedings of inferior tribunals acting within the general scope of their powers.

A PPLICATION for Prohibition.

Braughn, Buck, Dinkelspiel & Hart for the Relator.

Leonard, Marks & Bruenn for the Respondent.

The opinion of the Court was delivered by

WATKINS, J. In an attachment suit entitled *H. Wallach's Sons vs. Dan A. Mayer*, pending in the respondent's court, demand is made for the sum of \$1,352. In a supplemental petition, subsequently filed, the plaintiffs prayed for, and obtained from the respondent a writ of sequestration for the seizure and detention of all the commercial books of the defendant. The defendant moved to set aside this writ on several grounds, but the motion did not prevail, though the respondent granted the defendant a rule on the plaintiffs to show cause why the order granting the writ should not be vacated. This rule was tried, argued, submitted and discharged by the court.

On this substantial statement of facts the defendant, as relator here, complains that the respondent, "in ordering said writ of sequestration, exceeded the bounds of his jurisdiction, inasmuch as the cause in which the writ issued was not one contemplated, authorized, or allowed by law. That petitioner's books are not subject to seizure but are expressly exempted therefrom, not only by the general laws on the subject of exemptions from seizure, but also under Article 2 of the Constitution; that the law prescribes methods by which books and papers may be brought before the court, and said methods had been resorted to in the cause aforesaid."

That, moreover, said judge had exceeded the bounds of his jurisdiction in thus ignoring the issue made by a rule to show cause why a writ of sequestration should not issue for his commercial books and papers, which was quoted on a previous supplemental petition, and which still remains undisposed of.

The respondent returns that the averments of the relator's petition do not authorize this court to grant the relief prayed for; that it appears therefrom that he complains of an interlocutory order made by him in a cause of which he has full jurisdiction, and after a judicial hearing, and from which, if his complaints be well founded, he can

only be relieved by an appeal; that when such remedy exists, a writ of prohibition should not be granted.

He further returns that the relator did not, at any time, except to his jurisdiction in the premises, and in the absence of such plea, and a decree overruling same, the writ of prohibition cannot properly issue.

He further shows that the original suit in which said interlocutory order was granted has not been tried, but stands on answer, pending trial.

His answer concludes by stating that "in the interest of justice and to perpetuate evidence" he made the order complained of, and that in so doing he acted in his judicial capacity and, as he believes and avers, in the proper exercise of the powers vested in him by law.

We are of the opinion that the relator has not presented a case entitling him to relief at our hands.

This Court has frequently decided that it would exercise the supervisory power conferred upon it "only in cases where there has been a flagrant usurpation of authority, or when serious injury may occur to parties to whom no other remedies are afforded, or when the intermediate courts are without power to grant relief." *State ex rel. Sinnott vs. Falle*, 32 Ann. 555; *State ex rel. City of New Orleans vs. Judge*, 32 Ann. 552; *State ex rel. Follet vs. Judge*, 32 Ann. 1184.

We have said that "in the exercise of this power * * * we wish it distinctly understood that we will respect the independence of inferior courts in the determination of all questions confided to their judicial discretion, and shall not usurp merely appellate jurisdiction not conferred upon us by the Constitution." *State ex rel. City vs. Judge*, 32 Ann. 552.

We have decided that "the case being appealable, the relators have an adequate remedy by appeal, and are not entitled to the interposition of the prohibitive authority of this Court." *State ex rel. Follet vs. Judge*, 32 Ann. 1184; *State ex rel. Hernandez vs. Judge*, 33 Ann. 925; *State ex rel. Berthoud vs. Judge*, 34 Ann. 783.

It has been held that notwithstanding the relator's complaint may justly "cause an apprehension of injury, admitting that the court was without any authority in the premises, as alleged, yet a mere apprehension of injury is not of itself sufficient to justify the interference of this Court with the proceedings of an inferior tribunal. acting within the general scope of its powers and exercised in an appealable case." *State ex rel. Hernandez vs. Judge*, 33 Ann. 925.

As if to summarize the principles announced in all of the cases preceding, the Court said in *State ex rel. Berthoud vs. Judge*, 34 Ann. 783:

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"It may well be that the judgment is in flagrant violation of law, will work irreparable injury and visit a great hardship on the corporation affected by it, but under our well defined jurisdiction we are powerless to relieve the relator; and we have no more authority to revise that judgment than any other judgment in an unappealable case, falling, as this case undoubtedly does, within the jurisdiction of the court which rendered the judgment."

These decisions cover the instant case, in every possible view that can be taken of it. The order for the issuance of the writ of sequestration was made by the respondent in a cause depending in his court, over which he had undoubted jurisdiction. It was an interlocutory decree that he thought would subserve the ends of justice and perpetuate evidence material to said cause. Though it was granted *ex parte*, he gave to the relator permission to traverse it on a rule to show cause why same should not be set aside.

A trial of this rule was held, and the rule was discharged and the writ maintained.

The principal suit stands on answer, and has not been tried or decided. The amount involved therein is below the lower limit of our jurisdiction, and hence an appeal taken from such final judgment as may be rendered therein would be returnable to the Circuit Court of Appeals. If the relator has sustained any injury by the act of the respondent, in granting said interlocutory order, it is clear that he has adequate remedy by appeal, and it excludes the relief he has sought at our hands.

In quite a similar case the old Court entertained quite a like view of its prohibitive power over the judge of an inferior court. In that case the relators complained that under an execution of a judgment the plaintiffs had taken a rule on them to show cause why they should not produce their books of account, and which had been made absolute, notwithstanding their opposition. Of this application the Court said:

"It does not appear to us that the present case is one in which we are legally authorized to interfere. If the defendants have sustained an irreparable injury by the order for the production of their books, or if, in the ulterior proceedings they apprehend such an injury, they may be entitled to relief at our hands by an appeal. The State vs. Judge, 2 R. 566.

The relator specially invokes the Bill of Rights as protecting his commercial books and papers from seizure. Const., Art. 2.

It provides that "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and

State ex rel. Cain et al. vs. Judge.

seizures shall not be violated, and no warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

We fail to see in what way this constitutional provision applies to this case. The one under consideration was an order for the sequestration of the relator's *commercial* books and papers. It was made upon the sworn petition of the plaintiffs in a pending *civil* suit in the respondent's court. It was made in order to perpetuate certain testimony and to further the ends of justice. It was, in no proper sense, an order for such an "unreasonable seizure" as is contemplated in the cited article of the Constitution, and the relator's demand for prohibitive relief, on this ground must be denied, also.

It is therefore ordered that the alternative writ herein issued be rescinded, and that a peremptory writ of prohibition be refused, at relator's cost.

No. 10,246.

THE STATE EX REL. HUGH CAIN AND DAVID BURKE vs. F. D. KING,
JUDGE OF CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS,
DIVISION B.

When an injunction suit is dismissed and the injunction dissolved without damages, a bond for costs is all that the plaintiff and appellant can be required to furnish to entitle him to the appeal.

When the injunction bond has been fixed at an amount not sufficient to cover probable damages, the bond for appeal cannot be increased so as to make up the deficiency. Injunction and appeal bonds are distinct obligations, each conditioned for different purposes.

It is necessary, in order to ascertain the amount of a suspensive appeal bond, to consider what would be the effect of the judgment of the appellate court.

APPPLICATION for Mandamus.

Henry L. Lazarus for the Relators.

J. McConnell and *W. W. Vance* for the Respondent.

The opinion of the Court was delivered by

MCENERY, J. Relators, plaintiffs in the district court, filed a suit against Dennis McCarthy and L. W. Read, in which they alleged that they had been duly commissioned as harbor-masters for the port of New Orleans; and when in the exercise of the duties of said office and enjoying the emoluments of the same, the defendants asserted claim to

40	841
46	490
40	841
116	962
40	841
120	265

State ex rel. Cain et al. vs. Judge.

said office and that they were without right or authority to assume the duties or to discharge the functions of said office. That pending an inquiry into petitioners' title to said office they were entitled to a writ of injunction to prevent the defendants from interfering with them in the exercise of the functions of said office, etc.

An injunction issued as prayed for, on plaintiffs furnishing a bond in the sum of eight hundred dollars.

Defendants excepted to the petition on the ground that the State alone could institute the suit. The exception was maintained and the suit dismissed.

Plaintiffs moved for a suspensive appeal, which was granted, but the amount of the bond was not fixed. The judge *a quo* asked for argument from counsel, and took evidence as to the value of the office in dispute. Plaintiffs took no part in this proceeding. The judge fixed the amount of the bond at \$5,000.

Relators pray for a peremptory mandamus directing the respondent judge to grant an appeal on a bond for costs.

The error of the district judge in fixing the amount in the bond was the attempt to make the appeal bond supplement the deficiency of the injunction bond. They are distinct obligations, each conditioned for different purposes.

We are referred to several cases to support the position of respondent. In *State ex rel. Cain vs. Judge Sixth District Court*, 20 Ann. 374, there was an application for a mandamus to compel the granting of a suspensive appeal from a judgment determining the title to the office of Chief of Police of the city of New Orleans. The answer of the respondent was that a suspensive appeal was refused because the record did not show what the bond should be. The judgment of the court was that a suspensive appeal bond could be framed payable to the appellee in such an amount as the judge should determine, and that the amount should be fixed with a reasonable regard to the rights of appellee, particularly where the contest was one for office for which the salary was easily ascertained.

In *Blanchin vs. Fashion*, 10 Ann. 345, the sole question before the Court was whether an appeal from a judgment distributing \$3600, when the appeal bond was fixed at \$150, operated as a supersedeas. The fund was in the hands of an executive officer of the court. The judgment was that the appeal was suspensive and that the sheriff should have retained an amount to satisfy the claims of plaintiff.

In *Coons vs. Judge*, 27 Ann. 334, there is some confusion resulting probably from not a very clear statement of the issues involved. We

State ex rel. Cain et al. vs. Judge.

are constrained to say that the opinion therein rendered is not in accordance with the well established jurisprudence of this State. Referring to Hickey vs. Judge, 20 Ann. 108, the Court said: "Under the authority of this case we feel justified in saying that the relator is entitled to a suspensive appeal, and the bond which he should be required to give is not the value of the property in dispute but the damages which may result from the improper issuance of the injunction."

The appeal was from a judgment of non-suit. It is difficult to see how the appellate court could have given any judgment for damages for the wrongful issuance of the injunction. The only judgment, the most adverse to appellant, would have been to have affirmed the judgment, in which case the sureties on the appeal bond would only have been responsible for costs. Courts are not permitted to add conditions to bonds not authorized by law. A condition was added to the appeal bond which belonged to another bond given for a different object.

In Hart vs. Lazarus, judge, 34 Ann. 1210, this Court emphatically stated that the general rule is, when an injunction is dissolved without damages, the party cast is bound to give bond for appeal only for costs. As stated by the Court, there is no reason for a bond for damages other than the one given when the injunction was obtained, and that the judge has no authority to require other conditions than those prescribed by law, that the party may enjoy the constitutional right of appeal. It is true in this case a bond was required in addition to the injunction bond for reasons assigned by the court, but the appeal bond was fixed in an amount to cover costs only.

In the instant case there is no question raised as to the sufficiency of the injunction bond. The judgment appealed from dismissed the suit and dissolved the injunction without damages. The obligation of the surety on the bond is to satisfy whatever judgment may be rendered against the appellant on his failure to do so. Hence it is necessary, in order to ascertain the amount of a suspensive appeal bond, to consider what effect the judgment of the appellate court would produce.

There was no judgment for the payment of money, no property was ordered to be delivered, or any special act done the non-performance of which could work an injury. If appellants were cast in the appeal, the sureties on their default could not be called upon to pay any sum of money, to deliver any property or to do any act.

The only judgment that the appellate court could render against the appellants on the appeal, would be to affirm the judgment with cost,

State ex rel. City of New Orleans vs. Judge.

and the liability of the sureties would be restricted exclusively to the payment of the costs of appeal. As plaintiffs and appellants could only on appeal be subjected to the payment of costs, we conclude that the amount fixed by the district judge was excessive.

It is therefore ordered that the mandamus be made peremptory, directing the district judge to reduce the amount fixed by him for a suspensive appeal for costs only, to be fixed by said respondent judge, and that the parties in interest pay costs.

No. 10,262.

THE STATE EX REL. CITY OF NEW ORLEANS VS. THE JUDGE OF THE
SECOND CITY COURT.

Act 136 of 1880 does not repeal Act No. 90 of 1877, which is a *special* statute relative to the bringing of suits by the city of New Orleans, before justices of the peace, for the collection of licenses, and to the tax to be paid by the city on instituting such suits.

Act 136 of 1880 is a *general* statute, which fixes taxes to be paid in the shape of stamps, in all suits brought before district and city courts in New Orleans and which is not incompatible with the Act of 1877. Both can be reconciled and stand together.

Stamps for \$1.50 on a license for \$50 by the city is sufficient, and the city judge should issue process.

APPPLICATION for Mandamus.

W. B. Sommerville, Assistant City Attorney, for the Relator.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is an application for a *mandamus*, to compel the defendant to sign and issue process in a case before his court.

The defense is, that the stamps required by law were not affixed to the claim and that, until such stamps have been attached, the judge is prohibited from acting.

It appears that the city of New Orleans brought suit by rule, against a party for a license, claiming \$50 and that stamps for \$1.50 were placed on the claim filed.

The city judge contends that the city ought to have affixed stamps for \$3.00; that the Act of 1877, No. 90, on which the city relies, was repealed by Act of 1880, No. 136, and that by the latter, stamps for \$3.00 are required, on a claim between \$40 and \$60.

The Act of 1877 had for its object to authorize the bringing of city suits for licenses and taxes, before courts of justices of the peace and to fix the costs in such cases.

Beer et al. vs. Leonard.

The Act of 1880 proposed to fix the fees of clerks, sheriffs and constables in the district and city courts for the parish of Orleans.

The former was a special and the latter is a general statute.

It is true, that the Act of 1880 repeals all laws inconsistent with it and all laws on the same subject-matter, but this repeal does not apply to special laws which are not evidently or irresistibly repugnant to the general law and not on the same subject-matter.

Had the Act of 1880 distinctly stated that, in *all* cases, including those brought by the city of New Orleans for licenses, the stamps on all claims between \$40 and \$60 shall be \$3.00, instead of \$1.50, as fixed by anterior laws, the clash would have been so irresistible that the two acts could not have co-existed.

Taken together, the Acts of 1877 and of 1880 simply mean, that, except in suits brought by the city of New Orleans, under Act of 1877, the stamps in each case shall be affixed as regulated in the Act of 1880.

Repeals by implication are not favored by law.

Authorities need not be quoted on this question. It is a fact advanced by counsel representing the city, that such has been the uniform understanding and application of the law as well by city judges as by the Civil District Court in the exercise of its appellate jurisdiction over such city courts, and this statement is not contradicted.

This Court has already held, that laws anterior to first Monday in August, 1880, relative to justices of the peace, and which were not clearly repealed, are still in existence and may be enforced by the city courts created by the Constitution, Art. 135, which are assimilated to such justices. 33 Ann. 146; 37 Ann. 575.

Considering, therefore, that the required amount of stamps has been affixed by the city of New Orleans in the suit in question,

It is ordered and decreed that a peremptory *mandamus* issue to the judge of the Second City Court directing him to sign and issue the preliminary process in the suit mentioned in this proceeding, brought by the city of New Orleans against A. Chiapella, No. 71, of the docket of his court.

No. 10,198.

HENRY BEER ET AL. VS. W. B. LEONARD.

Good faith and possession are not sufficient to acquire immovable property by the prescription of ten years.

A title sufficient in form to transfer immovable property is required as the basis of prescription.

A purchaser of immovable property cannot be judicially coerced to accept a doubtful title.

40	845
45	1377
40	845
49	583
40	845
110	829

Beer et al. vs. Leonard.

A PPEAL from the Civil District Court for the Parish of Orleans.
Tissot, J.

Omer Villeré for Plaintiffs and Appellants.

Bayne, Denegre & Bayne for Defendant and Appellee.

The opinion of the Court was delivered by

POCHÉ, J. The object of plaintiffs in this suit is to enforce an agreement of the defendant to purchase from them a piece of immovable property, which they hold by purchase from one Francisco Pippo, effected in August, 1881.

The defense rests on the alleged deficiency of Pippo's title; and it was sustained below.

It appears from the record that Pippo's muniments of titles are as follows: to one-half of the property, by purchase, in the year 1871, from Joseph Spoturino, then the owner of the whole estate; and to the other half by purchase at a public sale from the succession of said Spoturino, as shown by an authentic act of sale executed in March, 1878.

Met by the allegation in defendant's answer, and being aware, that the projected sale of April, 1871, to Francisco Pippo, had never been signed by Spoturino, or by the notary who had drawn the same; and met also by the allegation of nullity of the proceedings which led to the sale of March, 1878, plaintiffs then pleaded the prescription of five and ten years, on which they rest their respective titles to each distinct undivided half of the property.

Plaintiffs' main error consists in their attempt to trace their title to the entire property to the sale made in the settlement of the succession of Spoturino. That sale was ordered at the instance of the public administrator, in charge of the succession, for the alleged purpose of effecting a partition of the property admitted to belong in equal portions to Pippo and to the succession. At that sale the adjudication of the entire property was made to Pippo for \$825, but as he claimed to already own the one-half, he paid in but half of the price of adjudication, and he therefore obtained, in terms and in fact, the transfer of but one-half of the property at the authentic sale made to him by the administrator on the 21st of March, 1878.

By the very terms of that sale, and throughout all the proceedings had in the settlement of the Spoturino succession, it is undoubtedly apparent that nothing was intended to affect the status of the other half of the property of which Pippo then claimed the ownership, and of which

Beer et al. vs. Leonard.

he was in undisputed possession. His title to that half must therefore be traced to some other source, and plaintiffs are manifestly in error in their reliance on the partition sale.

Conceding, therefore, as the record shows, that Pippo's possession dates from April, 1871, and that he was in perfect good faith, the question at once presents itself whether he can acquire title through the prescription of ten years by possession and good faith alone.

The question is answered in the negative by the textual provisions of the Code which regulate that term of prescription.

Article 3478 reads: "He who acquires an immovable in good faith and by a just title, prescribes for it in ten years."

Article 3479 prescribes the conditions on which such an object can be accomplished, and one of them is: "A title which shall be legal, and sufficient to transfer the property."

Now Articles 2275 and 2440 of the Civil Code contain the requirements of title so as to effect a legal transfer of immovable property, and in substance require that it must be in writing. *Barrow vs. Wilson*, 38 Ann. 209; *Pattison vs. Maloney*, 38 Ann. 885; *Hall & Toomer vs. Mooring*, 27 Ann. 596.

It therefore appears from the record that Pippo had no title legal in form to the half of the property of which he had possession since 1871. Plaintiffs could acquire no other or better title than he himself had. Hence, the defendant must be justified in refusing the title which is tendered to him.

As it is herein shown that Pippo had acquired no title to that half of the property through the partition sale of 1878, it follows that the plea of prescription of five years cannot avail plaintiffs; and their failure to establish a valid title to one-half of the property obviates the necessity of discussing the *status* or validity of their title to the other undivided half.

We note and have duly considered the argument that the heirs of Spoturino might be estopped by the judicial admissions of the public administrator, and by other proceedings had in the settlement of his succession, from denying or contesting the alleged title of Pippo which was therein admitted, and we do not wish to be understood as expressing any opinion on such an issue. It was incumbent on plaintiffs under the law to tender a title free of all clouds or doubts, and his purchaser cannot be coerced to accept a title suggestive of future litigation on the very face of the papers.

The judgment appealed from is therefore affirmed, with costs.

Dopler vs. Feigel.

No. 10,226.

SUCCESSION OF MRS. M. DOPLER OR DOBFLE vs. MRS. JUSTINE
FEIGEL AND HUSBAND.

The provisions of Articles 1497 and 1533, C. C., prohibiting donations of the whole of one's property without reserve of sufficient for subsistence, and also prohibiting the reservation of the usufruct of the thing given by the donor in his own favor, embody rules peculiar to donations *inter vivos* and have no application to onerous contracts.

The effect of Art. 1526, C. C., is to divide onerous and remunerative donations into two classes: one in which the value of the consideration, charges and services is less than one-half the value of the object and in which, therefore, the act partakes more of the character of a donation than of an onerous contract; and the other in which the value of the consideration exceeds one-half the value of the object and in which the act partakes more of the character of an onerous contract. The first are treated as donations and subjected to the peculiar rules governing them; the latter are treated as onerous contracts and are governed by the different rules applicable thereto.

Finding that, under the view most favorable to plaintiff, the contract sought to be annulled can only be treated as a disguised onerous and remunerative donation in which the value of the consideration, charges and services exceeded one-half the value of the object, it stands as an onerous contract and is subject to no vice applicable to such contracts which would authorize its annulment.

A PPEAL from the Civil District Court for the Parish of Orleans.
Tissot J.

F. L. Richardson and Branch K. Miller for Plaintiff and Appellant:

1. A donation of immovable property, with the reservation of the usufruct thereon by the donor, is null and void. R. C. C. Art. 1533; 15 Ann. 586; 5 Ann. 433; 11 Ann. 707; 12 Ann. 721; 4 Ann. 36.
2. A donation which divests the donor of the whole of his property, is null and void. R. C. C. 1497. It matters not that the donee agrees to support the donor during life. 11 R. 309.
3. The testimony of a defendant, the only witness in his own behalf, as to transactions with a party deceased, in support of a claim for entire succession, is the weakest of all evidence, and cannot support a judgment of recovery. 37 Ann. 95; 7 R. 112; 14 Ann. 272; 10 Ann. 279; 8 Ann. 278; Wood vs. Egen, 49 Ann. 1006; Bodenheime case, 25 Ann. 1006; Bonnat case, Manning's Reports, p. 339.
4. No tender of the so-called consideration is necessary. Seef vs. Taylor, 33 Ann. 769.

J. Q. A. Fellows for Defendants and Appellees:

The true cause of a contract may be shown by any legal evidence, oral or written, and the evidence adduced for that purpose never can be considered as contradicting. Articles C. C. 1894, 1900; 3 Ann. 230.

The allegations in a petition that a certain transfer of property is a simulation, and that it is a donation in disguise, are inconsistent.

Where an actual consideration, no matter how inadequate, has been paid by the purchaser, in an alleged sale, the transaction is not a simulated one.

The delivery of immovables, where they are disposed of by public act, is always considered as accompanying the act, whether that act be a sale or a donation *en paiement*.

Even where it is shown that the expressed consideration of a transfer does not exist, the contract can not on that account be invalidated, if the transferee proves that there was another legal and sufficient consideration. 30 Ann. 966.

Dopler vs. Feigel.

An onerous donation, when the value of the thing given does not exceed by one-half that of the charge imposed, is not subject to the rules prescribed for donations *inter vivos*; and an action for its dissolution must be governed by the rules relating to ordinary contracts.

Therefore, as in a suit for the rescission of a contract, in which the plaintiff must put, or offer to put, the defendant in the same position in which he was before the contract; in the case of an onerous donation, the donor or his representative, who seeks the rescission of the donation, must offer to return what he has received from the donee, as a condition precedent of the suit. 33 Ann. 786.

The law does not favor actions by forced heirs to undo transactions of their ancestors as done in fraud of their rights. The burden is upon them, and in the absence of convincing proof, and in the presence of evidence which merely cast a suspicion, the court will not take the property of one man to give it to another.

If it be true that forced heirs can be likened to creditors, and may resort to the revocatory action, their right to sue would be barred by one year from the death of the parent. 39 Ann. 1067.

In an action by forced heirs to annul a sale by their ancestor to one of their co-heirs of an immovable for a stipulated price for cash, parol evidence is admissible to show that the real consideration of the conveyance was the obligation undertaken by the heir to support the aged ancestor and his wife during their natural lives. Such an obligation is in law a sufficient consideration for conveyance.

Such a contract is really a donation *inter vivos* with an onerous condition, and such a donation can never be reduced below the expense incurred by the donee to perform the charges. 40 Ann. 229.

The opinion of the Court was delivered by

FENNER, J. The object of the suit is to annul an act of sale of immovable property made by the deceased, Mrs. Dopler, to the defendant and to recover the property with an account of its revenues. Although the title of the suit nominates the succession as plaintiff, the real and only plaintiff is the grand-daughter and sole forced heir of the deceased.

The grounds of attack are that the sale, as such, was a mere simulation, intended to cloak or disguise a donation, and that such donation is itself null because it embraced all the property of the donor without reserving sufficient for her subsistence, in violation of C. C. 1497, and also because it reserved the usufruct in favor of the donor, in violation of C. C. 1533.

The act of sale is authentic and perfect on its face. The price is fixed at \$900, of which \$138.50 was discharged by the purchaser's assumption of a mortgage due on the property, and the balance was acknowledged to have been paid in cash.

The sale was accompanied by a counter-letter which referred to and approved the sale, but which contained the further stipulations that the vendor should retain the entire usufruct of the property during her life, "that henceforth all the kindness and consideration due to an aged mother will be extended to me by said purchaser," and that "all

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taxes now due or hereafter accruing upon said property have been assumed by said purchaser."

Taking the act and the counter-letter together, the transaction stands as a conveyance of the *naked* property in the thing sold upon the following considerations, viz: 1st, the sum of \$900 named in the sale; 2d, the obligation to pay taxes past and future; 3d, the obligation to discharge the duties due from a child to an aged mother, which involve and include nurture, care and services in sickness and in health.

The party enjoying the usufruct of property is bound for the taxes; therefore the assumption of the purchaser to pay them was an obligation not imposed by law.

The purchaser was not the child of Mrs. Dopler, and owed her no legal duties; therefore the assumption of the duties imposed by law on a child was a distinct and additional consideration.

Nothing in the counter-letter attacks or is inconsistent with the verity of the consideration recited in the act of sale. On the contrary, the counter-letter recites and affirms the sale, only adding new stipulations in favor of the vendor and charges on the purchaser.

As we recently said in a similar case: "The act of sale is perfect on its face. It is just and translativ. It can convey property. It describes the real estate, specifies the price in cash, acknowledges payment and settlement. It must stand for what it purports to be until it is set aside. The burden is upon those who attack to *prove* that it was made without consideration or an insufficient one." *Moore vs. Wartelle*, 39 Ann. 1070.

We agree with the judge *a quo* that the record does not exhibit the proof required.

The retention of possession by the vendor and her continued collection of rents after the sale, lose all significance as badges of simulation in view of the stipulations in the counter-letter. And if the giving of a counter-letter containing such stipulations be treated as itself suggestive of simulation, we think the evidence in the record conclusively rebuts such suggestion.

It is not disputed that the mortgage debt assumed was due and was actually discharged. While it is admitted that the balance of the price named in the act was not then paid in cash, yet there is evidence, not contradicted, that there were claims due the purchaser for moneys disbursed on the property and otherwise for account of the vendor which, with the other charges assumed, were taken as a satisfaction of the balance of the price. It is further proved that the purchaser fully

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discharged all the charges assumed; that she paid the taxes; that she performed all the duties of a daughter to her; that she contributed to the supply of her wants, nurtured and cared for her in every way, nursed her in illness and buried her at death. These duties involved, not only valuable services, but considerable expenditures of money.

We are satisfied that a sound and real consideration was given for the property, undoubtedly exceeding one-half of its value after deducting the value of the usufruct which the vendor reserved.

This being so, it is not necessary to class or nominate the contract assailed. The most favorable assumption for plaintiff would be to treat it as an onerous and remunerative donation in disguise. But even in that case the Art. 1526, C. C., declares that "the rules peculiar to donations *inter vivos* do not apply to onerous and remunerative donations, except when the value of the object given exceeds by one-half that of the charges or of the services."

Therefore, the prohibitions of Articles 1497 and 1533, C. C., heretofore referred to, which apply exclusively to donations, have no application. *Landry vs. Landry*, 40 Ann. 232.

The effect of the Article 1526 above quoted is to divide onerous and remunerative donations, whether open or disguised, into two classes: one in which the value of the object exceeds, by one-half, the value of the consideration, charges and services, and in which, therefore, the act has more of the character of a donation than of an onerous contract; and the other, in which the consideration, charges and services exceed one-half the value of the object, and in which the act has more the character of an onerous contract than of a donation. The former are treated as donations and subjected to the peculiar rules governing them; the latter are treated as onerous contracts and are governed by the different rules applicable to them.

The present act belonging to the latter class, we know of no rule by which an onerous contract, based on such consideration, passed between capable persons, and tainted with no vice of fraud, error, violence, or other illegality, can be annulled or avoided.

Nullity or annulment *vel non* being the only issue involved in this case, plaintiff's demand was properly rejected.

Judgment affirmed.

State ex rel. Johnson vs. Judge.

No. 10,245.

THE STATE EX REL. A. L. JOHNSON vs. N. H. RIGHTOR, JUDGE
OF CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS, DIVI-
SION D.

Determining whether relator is or not entitled to a peremptory mandamus compelling the respondent judge to grant him a writ of injunction, depends upon whether the law entitles him to it, *as of right*. If the law gives the respondent the discretion to grant or refuse it, the mandamus will not go.

In a mandamus proceeding we are not to enquire whether, in dissolving the writ, the respondent exercised a sound and legal discretion, but to simply ascertain whether he had *any discretion at all*.

APPPLICATION for Mandamus.

Braughn, Buck, Dinkelspiel & Hart for the Relator.

Carleton Hunt for the Respondent.

The opinion of the Court was delivered by

WATKINS, J. A. L. Johnson filed a petition in the respondent's court, in which he claimed a large sum against the city of New Orleans, and requested the issuance of a writ of injunction against her, on certain grounds therein stated. The respondent granted an order directing the defendant to show cause on a day fixed, why the writ should not issue; and upon due hearing thereof, he refused to grant it. The relator assigns here that this act of the respondent was arbitrary and illegal, and "that there is absolutely no remedy or relief in the ordinary course of legal proceedings to protect relator's right, except the injunction applied for;" and that his only means of obtaining this is by mandamus.

The respondent returns, substantially, that the relator's petition "is inadequate and fails altogether to justify an injunction," and that "it discloses no cause of action," because it will appear by reference to the records in certain *other* suits and proceedings named, that the demands of the relator against the city are "charged to be fraudulent," and that this "is an issue under the law, for the (City) Council to pass upon, and not" himself, as judge.

He further returns "that relator has not brought himself within the terms and provisions of the Code of Practice entitling him to the benefits of the writ of injunction, as of right;" and he avers that he is not entitled to the writ under any of its provisions unless it be those of Article 303, which vests in the court of first instance, discretion in determining the necessity for its issuance; that in refusing the writ

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applied for by relator he acted within the discretion given him by law, and that his refusal was neither arbitrary nor illegal; and this exercise of judicial discretion cannot be reviewed and altered by mandamus.

Relator has annexed to his petition a copy of his petition for injunction, and made it a part of same. From it we obtain the following statement of his case, as presented to the respondent, viz:

He claims to be the transferee of a large number of claims against the city for about \$40,000, for services rendered by the original holders in the months of March and April, 1888, in the departments of improvements and police.

That "under the laws prescribing and regulating the financial administration of the city of New Orleans, her revenues are annually fixed and appropriated by a general ordinance called the Budget of the year, and that the amounts so appropriated to the particular objects stated in said Budget remain dedicated thereto, and cannot be diverted to any other cause or object, as long as any claims against said appropriation exist."

He avers "that in accordance with said law a budget of appropriations was adopted in 1887, for the year 1888, setting apart certain sums for the Department of Improvements and the Department of Police," and that in accordance with said appropriations said expenses were incurred, but the City Council "has failed and refused to pass appropriate ordinances against said general appropriation in the Budget to direct the payment of the rolls for March and April, 1888, in which his claims appear," but has "authorized expenditures against the Budget appropriations for improvements and police for subsequent months * * * *by reason of which the said appropriations will be totally absorbed and leave nothing whatever to pay said rolls of March and April.*"

Under this state of facts the relator seeks to be recognized as the transferee of said claims and the creditor of the city therefor, and to recover judgment directing "payment thereof, to be made as if ordinances directing same had been passed in due and proper time, before the passage of any ordinances directing payments of *subsequent work or service out of said Budget appropriations.*" etc.

In aid of this specific relief relator prayed for the issuance of a writ of injunction "prohibiting said city from making any further special appropriations against the general appropriation in said Budget contained to the credit of the departments of public works and police, or from making any payments on ordinances already passed, for services rendered subsequent to that herein claimed, until such amount as is required to pay petitioners shall have been set apart and reserved."

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The argument in support of his right to an injunction is that if the labor and police rolls of March and April are not paid from the revenues of 1888, as the law stands, he cannot be paid *at all*, and hence he is in danger of suffering an irreparable injury.

On this state of facts the question of law raised is, not whether the plaintiff was entitled to his injunction at all, but, rather, was he entitled to it as a matter of right, and had the respondent the discretion to refuse it. In a mandamus proceeding we are not at liberty to enquire whether, in disallowing the writ, the respondent exercised a sound and legal discretion, but to simply ascertain whether he had *any* discretion in the premises. His *exercise* of discretion can only be reviewed on appeal.

Such we understand to be the clear import of our opinions in *City of New Orleans vs. Great Southern Telephone and Telegraph Company*, 37 Ann. 571; and *State ex rel. Savage vs. Rightor*, judge, 38 Ann. 916.

Code of Practice, 298, provides that "injunction *must* be granted and directed against the defendant himself, in the following cases," enumerating them. Article 299, *et sequentes*, provide that "the injunction *may* be directed," etc., * * * in the following cases.

But the injunction prayed for by the relator does not fall within the denomination of any of the causes assigned under the former; it comes, possibly, within the scope of Article 303.

It provides that "besides the cases above mentioned, courts of justice *may* grant injunctions in all other cases when it is necessary to preserve the property in dispute during the pendency of the action, and to prevent one of the parties, during the continuance of the suit * * * doing some other act injurious to the other party."

In *Bush vs. Guinault*, 29 Ann. 795, the Court, in placing an interpretation on the final clause of that article, say: "Under this clause of Art. 303, it is clear, therefore, that a discretion is vested in the judge to determine whether the injurious act set forth is one proper for the exercise of the remedy of injunction."

Therefore, applying this interpretation of C. P. 303, to the case in hand, and the question propounded is answered in the negative; i. e., that the relator was not entitled to his writ of injunction as a matter of right.

And, inasmuch as the respondent was vested with *discretion* in the matter of the allowance *vel non* of the writ, relator cannot control his exercise of it by mandamus. High's Ex. Legal Rem. sec. 24; *State ex rel. Daboval vs. Police Jury*, 39 Ann. 765.

It is therefore ordered that the rule on the respondent to show cause be discharged, and a peremptory mandamus refused at relator's cost.

State ex rel. Gestner vs. Recorder.

No. 10,254.

THE STATE EX REL. PETER GESTNER VS. W. B. MURPHY, RECORDER.

A threat to burn a dwelling-house is a threatened breach of the peace, as it puts the party threatened in fear, and excites him to personal prowess to protect his person and property.

A magistrate has the power under Sec. 1016 R. S., to order the party making the threats to furnish security that he will not carry out the threat, and in default of furnishing security he has the power under said section to commit until the security ordered is furnished.

A PPLICATION for Prohibition.

Branch K. Miller for the Relator.

Walter D. Denegre for the Respondent.

The opinion of the Court was delivered by

MCEENERY, J. The question presented in this case is does the threat to burn the dwelling of another come within the power of the committing magistrate to put the party who makes the threat under peace bonds.

Section 1016 of Revised Statutes provides that the magistrate shall have power in all cases in which it shall appear to him by oath that a breach of the peace has been committed or that there is just cause to apprehend that a breach of the peace is intended, to cause the party charged to give security in such amount as he shall deem reasonable to keep the peace of the State and to answer to the offence if any has been committed. In case of refusal to give such bond he has the power to commit until security has been given. Arson is an offence both against the property and the person living or residing in the house. R. S. 841, 842.

The law makes a distinction in the crime of arson in the penalty when a human being is in the house residing or living in it at the time. The penalty is death when the offense is committed in the night time, and if in the day time at hard labor not more than twenty years. The penalties are less severe when no human being is living or residing in the house at the time. It is an offense against society as well as against property. Any threat therefore to commit arson is a threatened disturbance of the public order and well-being of society. It puts the party whose house is threatened to be burned in fear and invokes him to redress his wrongs, excites him to personal prowess to protect his person, his family and his property.

There is no question but that the magistrate has the power to put a party under peace bonds who threatens to do violence to the person of

State ex rel. Attorney General vs. Lazarus.

another. It would be impotent did it not go further and protect a person from the threats of the incendiary, who would not only do violence to his person and his property, but to his family and his neighbors.

We conclude that the threat to burn the dwelling of another is a threatened breach of the public peace, as it tends to provoke to acts of violence and a disturbance of the public order, and the committing magistrate has the power to require the party making the threats to give a bond in accordance with Sec. 1016, R. S., and in default of bond to commit until security is furnished.

It is therefore ordered that the writ of prohibition be refused, at relator's cost.

No ———

* STATE EX REL. M. J. CUNNINGHAM, ATTORNEY GENERAL, VS. H.
L. LAZARUS, JUDGE.

A rule to tax costs, and judgment thereon, are interlocutory, and form parts of the original proceedings.

It is a general rule that the sovereign cannot be sued in his own court without his consent: and hence no direct judgment can be rendered against him therein for costs, except in the manner, and on the conditions, he has prescribed.

When a state submits itself to the jurisdiction of a court in a particular case, either by the institution of suit or permitting itself to be sued, that jurisdiction may be used to give full effect to what the State has, by its act of submission, allowed to be done.

But it is the duty of the courts of the State to carefully examine the acts of submission, and determine the extent to which jurisdiction extends, and render judgment accordingly.

Neither the constitution nor the law governing such a proceeding as this confers jurisdiction on this court to render a direct judgment against the State for the costs of taking testimony therein, in any event.

W. S. Benedict, for Plaintiff.

M. J. Cunningham, Attorney General for the State.

The opinion of the court was delivered by

WATKINS, J. This proceeding by rule, to have the fees of Arthur McGuirk, for services rendered in the course of the trial of the aforesaid cause, as an expert stenographer and type-writer, taxed as costs, is one taken in the original suit, and the decree we are invited to render is an interlocutory one, and will, when rendered, form an *addendum* to the original judgment therein. *Iron Works vs. Reuss*, 40 La. Ann. 112; 3 South. Rep. 505, Rev. St. § 750. By the terms of the original decree, the charges made by the relator were sustained, the respondent removed from office, and condemned to pay all the costs of

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49	1380
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the proceedings. *State vs. Lazarus*, 39 La. Ann. 162, 1 South. Rep. 361. Of course, that judgment is a finality, with respect to the respondent, except as to the items and amount of the stenographer's bill. But quite a different question is presented for solution in respect to the State, because the State was personated by the attorney general as the relator. It is claimed by counsel for the plaintiff in rule that, notwithstanding judgment went in favor of the relator for "the costs of the proceedings," yet the State occupies the position of plaintiff in an ordinary civil action, and hence she is primarily bound to officers of courts for their costs. As it is of great importance, we will dispose of this issue first, it having been submitted as an exception of no cause of action.

Resistance to the demands of the plaintiff in rule is made by the attorney general on the authority of *State vs. Succession of Taylor* 33 La. Ann. 1270; *State vs. Taylor*, 34 La. Ann. 978. After what appears to us to have been a careful examination of the question of the State's liability for payment of costs in her own courts, we said in the former case: "The present suit is one in which the State is a party in her own name, and to enforce her own rights, and not those of any person or individual. In her own courts, constituted by herself, whose officers are appointed by herself, and whose costs and fees are paid by herself out of the fund created for that purpose, it would be an extraordinary proceeding to require her to furnish security for the payment of costs." Page 1273. In the latter we quoted the former with approval, and said: "It is well settled in American jurisprudence that the sovereign never pays costs. This doctrine, which is an essential element of our system of government, was recently recognized by us in the case of *State vs. Succession of Taylor*, 33 La. Ann. 1271."

But counsel for plaintiff argues that, in the case of *State vs. Succession of Taylor*, the question was not the actual liability of the State for costs, but her obligations *vel non* to furnish security for costs antecedent to judgment; that, as in that case, there appeared to have been no final judgment rendered for or against the State, the question here was not before us; and that *State vs. Taylor* was a criminal case, and the cost, in such cases, are governed by the provisions of Rev. St. §§ 1042, 1076. As this is a question of vital importance to the plaintiff in rule, and the amount claimed is large,—being in excess of \$3,000,—it may be well to look into the authorities on the subject, and apply the law to the facts of this case.

In the first place, as plaintiff's counsel seems to rely on it, we will examine the federal jurisprudence on the question.

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In *The Antelope*, 12 Wheat. 549, the Supreme Court say: "It is a general rule that no court can make a direct judgment or decree against the United States for costs and expenses, in a suit to which the United States is party, either on behalf of any suitor, or any officer of the government. As to the officers of the government, the law expressly provides a different mode. * * * Their accounts must be certified to and paid out of the treasury, and cannot lawfully constitute any part of the judgment or decree in the cause."

As announcing a different principle, counsel cite us to what is said in *U. S. vs. Ringgold*, 8 Pet. 163, and which, after quoting *ipsissimis verbis* the rule as formulated in the opinion *supra*, is in these words: "But it by no means follows that they [the United States] are not liable for their own costs. No direct suit can be maintained against the United States. But when an action is brought by the United States to recover money in the hands of a party who has a legal claim against them, it would be a very rigid principle to deny to him the right of setting up such a claim in a court of justice, and turn him around to an application to congress."

There is nothing, to our thinking, that is in the least contradictory or conflicting in those opinions. They are to the effect that no direct judgment can be rendered by any court against the United States for costs. They do not declare that they are not liable for them in proper cases. Now, what the court said, in the case last cited, with regard to the "legal claim" of the defendant in a civil action brought by the United States, was to merely sanction his right to urge it in that suit as a reconventional demand. It did not say that he might take a judgment against the United States for cost of such demand. All those questions were evidently governed by the act of Congress of the 8th of May, 1792, and subsequent acts in relation to judicial costs and other expenses, accounts of which were to be paid from the national treasury upon proper certification and approval of some competent judge.

Those decisions are in accord with our own jurisprudence. It is a familiar principle "that the sovereign cannot be sued in his own courts without his consent." *State vs. Burke*, 34 La. Ann. 548, and authorities collated therein. And it is perfectly true that, as said by the Supreme Court in *Louisiana vs. Jumel*, 107 U. S. 728, 2 Sup. Ct. Rep. 128: "When a State submits itself, without reservation, to the jurisdiction of a court in a particular case, that jurisdiction may be used to give full effect to what the State has, by its act of submission, allowed to be done;" but it is the imperative duty of such court to look carefully into the act

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of submission, and the law under which the submission is made, and determine whether it was done without reservation or qualification; else the judgment it should render in the premises would be nugatory, and of no binding force against the State.

The case of Mahan vs. Sundry Defendants, 22 La. Ann. 583, was a suit by the clerk of the Fourth District Court of the Parish of Orleans, to compel the State Auditor to warrant for "costs in certain cases" in his favor, on an appropriation made by the legislature in 1870, in these words, viz: "Appropriation to pay costs in suits when the State loses the case, \$2,000, or so much thereof as may be necessary." Act 35 of 1870. The cases in which those costs were incurred were suits instituted by tax collectors, and had relation to the collection of the revenue. The court said: "The State is, doubtless, responsible for all costs legally incurred in its behalf, but the mode of paying them is to be provided by the legislature. The appropriation in question is not in our opinion, the provision made for the payment of the costs claimed in this proceeding. If the statute authorizing the suits, or proceedings in which they accrued, does not provide for their payment, or some other special statute, the clerk took the risk of the legislature providing for them, when applied to."

Referring to the statute under which proceedings were conducted against the respondent in this case, we are confronted with this provision, viz: "That in all such cases the defendant judge shall be condemned to pay the costs, if judgment be rendered against him; otherwise, judgment for costs shall be rendered as is provided for in Article 200 of the State Constitution." Acts La. 1880, No. 122, § 7. That article provides that, "in all cases where the officer sued as above directed shall be acquitted, judgment shall be rendered against the citizens signing the request for all costs of the suit."

Applying the principles of law, State and Federal—and, we take it, they are unmistakably sound—it is obvious that the State has not consented that we should render a judgment against her, in a suit which was decided favorably to her, for the cost of taking testimony therein. This being an exceptional proceeding—neither criminal nor civil, but one partaking of the character of an impeachment—we must look to the provisions of the Constitution, and the law putting same in force, as the source of our jurisdiction, and its extent. Viewing them in the light we do, we are constrained to decide that the plaintiff in rule has no right of action against the State, and that we are without power to render judgment against her in his favor. But we are far from holding that the State is not, in law and justice, bound to pay the plaintiff

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for his valuable services and necessary labor, done in a litigation provoked and carried on in the State's own interest, and by constitutional direction, in case his primary recourse against the defendant shall prove unavailing. On the contrary, we consider it to be her unquestionable duty to provide such payment. But her exemption from judicial compulsion would render nugatory any action which might be taken by us, either in decreeing her liability, or fixing the amount thereof; and we must therefore decline such action.

On the other branch of the case there is but little to say. No question is raised by the respondent with regard to the amount or character of the plaintiff's demands. He was duly cited, but made neither appearance nor answer, and there was no countervailing evidence adduced in his favor. In rendering judgment, we adopt the amount stated in plaintiff's evidence, because respondent has not questioned the correctness of his account; it was approved by his counsel, and sworn to by the plaintiff as a witness. But we do not, by any means, thereby signify any opinion as to the measure of the State's liability, in case the legislative department of the government shall provide for its payment.

By reason of the default of the respondent, and the law and the evidence being in favor of the plaintiff in rule, and against the respondent, it is ordered, adjudged and decreed that the amount of the plaintiff's demands be fixed at the sum of \$3,220. It is further ordered, adjudged and decreed that the plaintiff's demands against the State be rejected, because he has no right of action, and because this Court is without jurisdiction to render judgment against the State in a matter in which she has not yielded her assent. It is further ordered that the plaintiff in rule pay the costs of his proceedings against the State, and that he recover the remainder thereof against the respondent.

* This case having been omitted in the Reports, by error, is now published by direction of the Court. REPORTER.

No. 10,089.

* STATE OF LOUISIANA VS. LANDRY THOMAS.

In all criminal prosecutions it is the desire, and to the interest of the State, that all reasonable facilities be extended to the accused in the preparation of his defense. Hence the accused is not responsible for the error committed by the clerk in issuing *subpoenas* to witnesses for the defense, if it appears that the order for such witnesses had been given in a proper manner by the accused or his counsel, and that the witnesses they ordered are residents of the Parish.

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A party accused, who discovers on the day fixed for his trial that a material and important witness ordered by him and by whom alone he could establish a fact important or indispensable to his defense, had not been summoned, because the given name of the witness had been by error of the clerk changed into another name, in making out the summons, is legally entitled to a continuance on proper showing for the purpose of procuring the attendance of such witness. For making the discovery on the day of trial only he cannot be charged with want of due diligence,

The opinion of the court was delivered by

POCHE, J. The defendant appeals from a sentence of death under a conviction of rape, and charges numerous errors to his detriment.

His first complaint is levelled at the Judge's refusal of a continuance which he had asked under the following circumstances :

When brought up for trial, on the 28th of October, 1887, the accused filed a motion for continuance, on the ground of the absence of a material and important witness, residing in the Parish, who had not been summoned although his name had been written, with an order for a *subpœna* in the proper book by defendant's counsel on the 24th of October, four days previous to the day of trial.

The Judge's refusal was grounded on want of proper diligence on the part of the accused to secure the attendance of the witness.

It appears from the record, and from the original order for *subpœna* to witnesses, as written by counsel, and which is attached to his bill of exception, that in writing down the name of that witness, which is "Archie Sanders," counsel connected the letters in such a manner that at a first glance given, name looked like "*Ardire*," and hence the summons was addressed by the clerk to "*Ardue Sanders*," and the Sheriff returned that the person thus named could not be found.

In reading the name as written in the original order we find no difficulty to make out the name of "*Archie Sanders*" as that of the person intended by the writer of the order. The question presented is therefore to determine whether the accused can be held responsible for the error of the clerk in summoning the wrong person, or in making out a summons addressed to so strange and unusual a name as *Ardue* as a given name, especially when coupled with the cognomen of "Sanders."

To the suggestion of the District Judge, that under ordinary diligence it was incumbent on the defendant to have discovered the error, and to have had the same corrected in time for the trial, "as the return of the Sheriff was made some time before the case was called for trial," an easy answer is that the accused should not be made to suffer for an error of the clerk, whose plain duty was to call on counsel for the

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accused to remove the doubt which he might have entertained as to the precise name intended to have been written by the attorney.

We do not understand the discussion to involve the question of due diligence at all; but merely and exclusively to deal with the consequence of a palpable error committed by an officer over whom the accused or his counsel had no control, and for whose error the injured party can surely not be held responsible.

But should the question of due or ordinary diligence be considered as the pivotal point of the contention, the record does not warrant the conclusion that the accused is guilty of any laches on that score. In his statement that the Sheriff's return had been made "some time before the case was called for trial," the Judge does not inform us of the precise length of time which intervened between the return and the trial; whether the return was made on the same day or the day before. As the order had been given on the 24th, and the trial took place on the 28th, of October, it is clear that the "some time" referred to by the Judge could not have meant several days; and the doubt resulting from the expression above quoted cannot be construed against the accused. Hence it does not appear that the question of due diligence could be decided adversely to the motion.

Now it appears that, the indictment had been presented on the 21st of October, the case was fixed for trial on the 28th of same month, the *subpoenas* for witnesses ordered on the 24th and the continuance asked by the accused was only to the 31st of the same month, at which time a jury would have been in attendance. Was there anything extraordinary or unreasonable in the delay prayed for, or day the relief asked suggest anything to justify the conclusion of the trial judge that the sole object of the motion was delay? We think not. In his motion supported by affidavit, the accused states, that by the testimony of Archie Sanders he could prove a very material fact which if established would necessarily have changed the verdict, and that he could not prove that fact by any other witness. 8 Mo. 606, Freleigh vs. State. The fact is detailed with precision in the motion, but we deem it best not to reproduce it in this opinion.

Now, through the error of a ministerial officer who failed to read, or to copy, correctly, a plainly written name, the accused has been deprived of the benefit of most important testimony. It may be that the witness if present would not have testified as represented by the accused. But this supposition cannot impair his legal right to secure his attendance and to produce his testimony.

State vs. Thomas.

If the witness, when produced, should entirely fail to establish the fact relied on, that circumstance will strengthen the case of the State, will remove the last doubt as to the guilt of the accused and the correct administration of justice will to that extent be enhanced.

In a criminal prosecution, the State is not zealous for conviction; her only aim is justice, which will not condemn without a fair and impartial hearing. Hence the State herself tenders her whole power to the accused in his efforts to prove his innocence, and her desire as well as her interest require that all facilities be given to the accused to produce all the testimony which the nature of his case may admit of or require.

Counsel for the defendant, after giving his order for witnesses in manner and form required by law and by the rules of the court, together with the written information of the place where the witnesses resided, as shown to have been done in this case, and within a reasonable time before the day fixed for the trial, knowing that the witnesses to be summoned were residents of, and were present, in the Parish, had every reason and every right in law to presume that the summons would be issued as ordered, and served in time for the trial. Hence his client cannot suffer for the laches or errors of others.

As we are thoroughly convinced that through inadvertence of the trial judge, the defendant has been denied a right to which he was legally entitled, we are constrained to overcome our repugnance to interfere in such cases with rulings of the District Courts, and to set aside the conviction of this defendant. *State vs. Egan*, 37 Ann. 371. *State vs. Bolds*, 37 Ann. 310. *State vs. Briggs*, 34 Ann. 71. *State vs. Boitreaux*, 31 Ann. 189.

Under these views, the discussion of the other complaints urged by his counsel is entirely obviated.

It is therefore ordered, adjudged, and decreed that the verdict of the jury be set aside, and the judgment appealed from annulled and reversed; and it is ordered that the case be remanded for further proceedings according to law.

* This case having been incorrectly printed at page 151 of this volume, is republished for the purpose of rectification of the typographical errors. REPORTER.



INDEX.

ACTIONS.

An action brought under the provisions of a special statute is not necessarily petitory or possessory. It may be *sui generis*.

Morgan vs. Nagodish et als, p. 246.

Forced heirs have an action in reduction of excessive donations, which extends not only against co-heirs, but even against strangers. It includes a spouse.

Succession J. T. Moore, p. 531.

In this action for slander of title, defendant, by setting up title in himself, converts it into a petitory in which he must be treated as plaintiff carrying the burden of clearly establishing his claim.

Plaintiff showing a title derived from the undisputed owner in 1851, cannot be ousted by defendant, who claims under a judicial sale made in a proceeding *in rem* in 1852, without clearly proving that the sale and proceeding were of a character to operate a valid divestiture of the property, particularly when the judicial sale was not followed by possession, and when the property had never been assessed or taxed in his name or those of his authors, but had, for a long period, been assessed in the name of plaintiff's authors, and had been possessed and valuably improved by plaintiff without notice of defendant's claim,

Sully vs. Spearing, p. 558.

ADMINISTRATORS.

There can be no valid appointment of an administrator unless such an appointment is made under the authority of an order therefor, signed either by the judge or the clerk. Letters of administration issued in the absence of such an order are null and void.

Mrs. Wirt, et als. vs. Pintard, p. 233.

An administrator is entitled to credit for moneys paid out for the repair or preservation of plantation buildings and machinery, also for insurance on gin-house, though the policy issued in the name of the factor or commission merchant for the estate.

A daughter of the intestate, who occupies with her minor children a plantation dwelling-house should not be charged rent, where she has not contracted to do so, and where the building is not needed

ADMINISTRATORS—Continued.

for the administrator or a tenant and is not required for the cultivation of the plantation.

Where an administrator has conducted planting operations and a mercantile business on account of the succession, and two of the legal heirs have agreed that their shares in the succession shall be responsible for the debts contracted by the administrator for this unauthorized cultivation of the succession plantation, they do not bind themselves personally for the debts, nor are their shares liable for more than a third of the debts. Nor are the heirs committed by such agreement to correctness of the account and estopped from disputing it. Nor will a judgment decreeing the liability of such shares for the debt be held as *res judicata* against their right to dispute it, or show its payment or extinguishment.

Where the administrator has employed competent and experienced attorneys, who are fully capable alone to perform every service required of them pertaining to the regular and usual administration of the succession, he is not authorized to employ at the expense of the succession other attorneys, whose services are directed mainly to the enforcement of a large claim against the succession in favor of a firm of which the administrator is a member. Their fee is not a proper charge against the succession.

The entire commissions of an administrator of a large succession are not properly exigible before the administration is terminated. Prior to this his commissions on sums received and distributed should be paid, and his rights as to the residue reserved for his final account. He is entitled to commissions on the rentals of the plantation, though leased by himself.

Succession of Sparrow, p. 424.

ADOPTION.

An act of adoption executed since 1872, before a notary public, by husband and wife, with the consent of the widowed mother of the child, is valid, though not authorized by judicial sanction.

The Act of 1872, No. 31, providing for the manner of adopting children, dispenses with the judicial permission, previously required by the Act of 1865, No. 48. A notarial act is the only act now required.

Succession of J. Volmer, p. 593.

AFFREIGHTMENT.

A contract of affreightment by charter party is valid when made by parol, and when terminable at the will of the charterer.

There are two kinds of contract of affreightment by charter party.

The first is where the owner agrees to carry a cargo which the charterer agrees to provide. The second is the contract of the

AFFREIGHTMENT—Continued.

instant case, that is to say, where there is an entire surrender by the owner of the vessel to the charterer, who hires the vessel as one hires a house, takes her empty, and provides the officers, crew, provisions, etc.

In such a contract, the charterer is substituted in the place of the owner, and becomes owner for the voyage, or owner *pro hac vice*. Here, therefore, the charterer and not the general owner is liable for materials and supplies.

In an action on account against the alleged owner of a ship for materials and supplies furnished the vessel, under the general issue the defendant may prove a charter party showing a demise of the ship to the charterer during the time covered by the account. Reaffirming *R. R. Co. vs. Herne*, 2 Ann. 127.

C. A. Fish & Co. vs. M. H. Sullivan, p. 193.

ALIMONY.

A child who has furnished alimony and thus maintained an ascendant in need is not entitled to recover the value thereof from the latter's insolvent succession. Having paid a debt, he cannot claim to be a creditor. A transfer of his claim conveys no right which he did not possess.

Succession of Guidry, p. 671.

APPEAL.

Where the minutes of the court show that the motion for the appeal and the order thereon granting the appeal were made in open court, parol evidence is inadmissible, in the absence of any averment of fraud or error, to contradict the record. The record is conclusive.

Mechanics and Traders' Insurance Co. vs. Levi et al., p. 135.

Acquiescence by appellant in the judgment appealed from defeats the right of appeal.

Thus, in a contest between the bishop of a diocese and a board of church wardens, involving the right claimed by the latter, denied by the former, of administering the temporal affairs of a church, in which the legal existence of the corporation represented by the board is the main issue in the cause acts of the bishop by which he recognizes the authority of such board and deals with them as such touching the administration of the church, after rendition of the judgment complained of, will be fatal to his right of appeal.

Board of Church Wardens vs. Bishop et al., p. 201.

Under the rules of the Civil District Court an injunction proceeding against the execution of a judgment is filed and treated as part of the suit in which the judgment enjoined was rendered. In such a

APPEAL---Continued.

case, after judgment rendered in the injunction proceeding, where neither appeal requires any bond except for costs, appeals from both judgments may be well taken under one order and one bond fixed by the court. 30 Ann. 801; 36 Ann. 963.

Inaccuracies in an order or bond of appeal in describing the judgments appealed from will not invalidate the appeal if the description contains statements sufficient to identify the judgments referred to,

People's Brewing Co. vs. John Babinger et al., p. 277.

An order granting to an appellant additional delay for filing his transcript after the return day, inadvertently, in contravention of the rule of the Code of Practice (Art. 883), will be rescinded by the Supreme Court on its own motion, and cannot save the appeal.

Such an order, obtained on the fourth judicial day after the return day, is an absolute nullity. In making motions for extension of the return day, appellants must be careful to be within the plain requisites of the law, or else they will eventually be deprived of any relief granted inadvertently.

A proceeding filed by the appellant in the appellate tribunal on the last day of grace, stating the cause not under his control by which he was prevented from filing his transcript in time, but which contains no prayer for an extension, cannot avail him.

Joseph Hols vs. Louis Fishel et al. Edward O. Palmer vs. Thomas Duffy, sheriff, et al. (Consolidated.) p. 294.

Judgment having been contradictorily rendered in a contest between two applicants for the appointment of an administrator, and the unsuccessful party having thereafter joined issue on the merits with the successful party in a suit instituted by him as administrator of the succession, this cannot be considered and treated as such an acquiescence in said judgment as would prevent a subsequent appeal therefrom. *Succession of Lamm*, p. 312.

When a party, charged with violating a parish ordinance inflicting a fine for certain prohibited acts, appears and files a plea or demurrer admitting the act but setting up the nullity of the ordinance, the case involves a contestation as to constitutionality or legality of a fine or penalty imposed, and is appealable to this Court.

The State and police jury having both joined in the appeal, and the defendant being duly cited, all proper parties are certainly before us and even if the joinder of appellants was unnecessary, it obviates all ground of objection to absence of parties which is urged in the motion. *State and Police Jury vs. Isabel*, p. 340.

APPEAL—*Continued.*

Neither the State nor the city of New Orleans can be required to give an appeal bond. The State Tax Collector and the Board of Assessors are State functionaries, and their appeal is the appeal of the State, and no bond is necessary to perfect it.

Merchants' Mutual Insurance Co. vs. Board of Assessors, p. 371.

Under the terms of Section 1 of Act 11 of 1875, the Board of Liquidation is prohibited from issuing bonds of the State in lieu of its outstanding obligations, bearing date antecedent to its passage, until the legality and validity of same had been first determined and established by final decree of this Court.

Necessarily, the duty of the plaintiff was to prosecute an appeal to this Court, in order to obtain such final decree, notwithstanding there was a judgment in his favor in the lower court.

Jardet vs. Board of Liquidation, p. 379.

Inaccuracies in a motion of appeal, in the bond and in the certificate of the clerk, amounting at most to clerical errors, are not sufficient to justify the dismissal of an appeal, if the proceedings are otherwise sufficient to identify the appeal with the judgment complained of, with legal certainty.

The rights of litigants cannot be jeopardized by slight inaccuracies of their council, or by the incompetency of clerks.

Pasley vs. McConnell, p. 609.

Where a devolutive appeal is taken from an alternative judgment which directs the defendant to do a certain thing within a fixed delay, and in default thereof, inflicts a more onerous penalty, execution of the first alternative under protest, and with reservation of rights of appeal, is not such voluntary acquiescence as destroys the appeal.

Colvin vs. Woodward, p. 627.

The Supreme Court has no jurisdiction over a controversy in which the matter in dispute is the nullity or validity of a judgment rendered for less than the lower limit of its appellate jurisdiction.

An appellee who has represented to this Court that a case was not within its jurisdiction and the court has acted on that representation by dismissing the appeal; who subsequently acquiesces in this judgment and voluntarily permits, without any objection, the Circuit Court to hear and determine the same case; who afterwards applies for a prohibition to this Court to arrest the execution of the judgment of the latter court, but is denied the same, and who sues to annul the judgment, surely cannot be heard any longer to set up want of jurisdiction *ratione materiæ* in the court rendering the judgment.

Singer vs. McGuire, sheriff et al., p. 638.

APPEAL—Continued.

Where the judge *a quo* properly dismisses a suit for insufficiency of evidence to establish plaintiff's demand, and the defendants ask that it be affirmed, the judgment will not be disturbed.

Laperle Richard et al. vs. Jean B. Bergeron et al., p. 717.

Under the construction placed in jurisprudence on the provisions of Article 318 of the Code of Practice, Rule 29 of the Civil District Court of the Parish of Orleans, which provides that appeals from city courts must be filed before the expiration of the tenth day after the bond of appeal has been filed in the City Court, must be construed so as to exclude in the computation of the time, the day on which the bond has been filed as well as the day on which the transcript was required to be filed in the appellate court, under the rule.

There is no perceptible or substantial difference between Rule 29 of the Civil District Court and Section 2093 of the Revised Statutes of 1870. In dealing with rules of practice the Supreme Court will follow judicial precedents, with a view to the uniformity of such rules.

The State ex rel. Solari vs. Judge, p. 793.

A Judgment or decree appointing a provisional syndic, in an insolvency proceeding, cannot be suspensively appealed from. It must be executed, although an appeal was granted from it and was perfected.

The State ex rel. Levy & Son vs. Judge, p. 818.

When an injunction suit is dismissed and the injunction dissolved without damages, a bond for costs is all that the plaintiff and appellant can be required to furnish to entitle him to the appeal.

When the injunction bond has been fixed at an amount not sufficient to cover probable damages, the bond for appeal cannot be increased so as to make up the deficiency. Injunction and appeal bonds are distinct obligations, each conditioned for different purposes.

It is necessary, in order to ascertain the amount of a suspensive appeal bond, to consider what would be the effect of the judgment of the appellate court.

The State ex rel. Cain et al. vs. Judge, p. 841.

In furtherance of the ends of justice, a case will be remanded to enable a plaintiff to amend so as to set forth more explicitly his cause of action.

Pasley vs. McConnell, p. 609.

ASSESSMENT.

Sec. 13 of Act 96 of 1882, which provides for the filing by each taxpayer of a list of his property, to be delivered to the assessor, is

ASSESSMENT—Continued.

not mandatory. It provides no penalty for non-compliance, and cannot produce the effect of shutting out the taxpayer from all relief, owing to his omission.

It is unnecessary to adduce evidence to justify an assessment apparently legally made. It stands until it is shown to be erroneous by satisfactory proof.

Assessors ought not to permit assessments to be made by others. Their sworn duty is to value the property themselves.

The rule is well settled as regards corporations, that they are liable to assessment only for the excess of the market value of their capital stock over and above that of its tangible property otherwise assessed and taxed.

Satisfactory proof that an assessment of the taxable property of a corporation is unwarranted and excessive, justifies a reduction to a reasonable amount.

Insurance Company vs. Board of Assessors et al., p. 371.

ATTORNEY AT LAW.

Sections 128 and 2897 of the Revised Statutes confer no privilege upon real estate in favor of Attorney's at Law for their professional fees in obtaining judgment maintaining the title and possession of defendants in a petitory action.

The moment such a judgment becomes final its object is attained, and nothing remains to which a privilege could attach.

Mechanics and Traders' Insurance Co. vs. Levi et al., p. 135.

BILL OF EXCEPTION.

A bill of exceptions is only necessary for the purpose of disclosing to the appellate court what the judge's ruling was, and the grounds of objection thereto. If they appear of record, the right of the party excepting is fully preserved without the retention of a bill

The State ex rel. Schlater vs. Judge, p. 809.

BILLS AND NOTES.

A note secured by mortgage, issued by a planter to the order of his merchant, to make good all advances for the working of a plantation, although received as "COLLATERAL SECURITY," may be sued on, directly by the latter, for the exact amount of the advances,—as a pledgee could do.

In the absence of proof of want of consideration, and in the presence of evidence showing that the advances have been made, payment of the note may be enforced by the seizure and sale of the mortgaged property.

John Chaffe & Sons vs. Mrs. Mary F. Whitfield, p. 631.

BILLS AND NOTES—*Continued.*

When a planter executes his notes, and discounts them with his factor, who places their proceeds to his credit on account, the same may be sued upon *via ordinaria* by the latter, the right being reserved the former to prove a want or failure of consideration therefor.

P. G. Gilbert vs. David Seiss, p. 667.

BOARD OF LIQUIDATION.

Under the terms of Section 1 of Act 11 of 1875, the Board of Liquidation is prohibited from issuing bonds of the State in lieu of its outstanding obligations, bearing date antecedent to its passage, until the legality and validity of same had been first determined and established by final decree of this Court.

Necessarily, the duty of the plaintiff was to prosecute an appeal to this Court, in order to obtain such final decree, notwithstanding there was judgment in his favor in the lower court.

Alfred Jarret vs. Board of Liquidation, p. 379.

The premium bond plan included all the *bonded* debt of the city of New Orleans of date antecedent to the adoption of the premium bond act in 1876; but it did not include any part of the city's *floating* debt.

Act 58 of 1882 included all of the city's bonded debt, other than that which had been funded into premium bonds.

Act 31 of 1876 and 58 of 1882 operate as contracts between the city and her bonded creditors, and were based upon adequate consideration.

The surplus of the premium bond tax beyond the requirements of holders, other than the city, received its destination to the retirement of outstanding bonds, not funded into premium bonds by the terms of the premium bond act in 1876, antecedent to the adoption of the Constitution of 1879, and this covenant was but re-affirmed and re-announced in Act 58 of 1882.

There is a conflict between the provisions of Section 4 of Act 67 of 1884 and that of Section 7 of Act 58 of 1882, both of them having the common object of dedicating to two different classes of city debts the surplus of the premium bond tax.

The State ex rel. Samuel Wood vs. Board of Liquidation of the City Debt, p. 398.

CAUSE OF ACTION.

A petition in which is demanded by a vendee reimbursement by the vendor of taxes paid since sale, which existed anterior thereto, and damages sustained by him in a loss occasioned by a *private* dispo-

CAUSE OF ACTION—Continued.

sition of the property, states a cause of action as to the former, but not as to the latter.

Suit for reimbursement of taxes paid is a personal action only, prescribed by ten years.

In such a suit no allegation of eviction is necessary, as a *sine qua non* for the discharge of the taxes encumbering the property acquired. It is only necessary to allege the existence and discharge of same.

L. D. Sandidge vs. Turner Hunt, p. 766.

CERTIORARI AND PROHIBITION.

Under an ordinance of the city of Baton Rouge the owner of a dog was ordered by the mayor of the city to produce the animal at his office that it might be killed. The dog was brought to the mayor's office in compliance with the order, but the killing was prevented by an injunction from a competent court. Thereupon the owner of the dog was sentenced to imprisonment in the parish jail for twenty days. *Held*, that the sentence was null and the action of the mayor arbitrary and oppressive.

State ex rel. J. Schroeder vs. Mayor of the City of Baton Rouge, p. 209.

In order to invoke the exercise of the supervisory jurisdiction of this Court under the writs of certiorari and prohibition, relator must establish one of three things, viz: 1st. That the proceedings are infected with some frigid irregularity; or 2d. That the jurisdiction of the cause did not belong to the court which assumed it, but to a different court; or 3d. That the cause is of a nature jurisdiction of which is denied to any court, because not within the limits of judicial power.

Constitutional executive officers are not exempt from judicial authority to compel them to perform specific duties imposed upon them by law.

Officers charged with the conduct of elections and with the ascertainment and promulgation of the results thereof, may be compelled by mandamus proceedings to perform specific ministerial duties imposed on them by law.

Where the statute requires the registrar to appoint commissioners ten days, and to publish them six days, before the election, if he has violated his legal duty in the selection of such commissioners, parties interested are not precluded from judicial remedy because he has so acted. They could not proceed before he had acted, and if denied the right to proceed afterward this would be a complete denial of right. The object of the law in requiring action a cer-

CERTIORARI AND PROHIBITION.—*Continued.*

tain time before the election was to afford an opportunity to correct any violation of duty which he might commit.

The questions as to whether the law imposed the duty alleged, whether the duty was ministerial or discretionary in its character, and whether the defendant had violated his duty, are mixed questions of law and fact belonging exclusively to the merits of the cause and constituting, indeed, the entire merits thereof, and the court being seized with jurisdiction of the case was necessarily invested with full power to consider and determine them. Mere error in the judgment, even if it exists, could only be corrected by us in the exercise of a jurisdiction purely appellate, and can form no foundation for invoking our supervisory jurisdiction.

The State ex rel. I. W. Patton, register, vs. Judge, p. 393.

The Supreme Court will not interfere with inferior courts in cases of contempt, when it is found that such courts exercised a jurisdiction vested in them, that the decree rendered was a proper exercise of judicial power, and that disobedience of such order was punishable as a contempt.

In such cases it has no concern with the question whether the act charged was or not committed, or did or not constitute a contempt, and will not review the facts on which the lower court acted to punish for contempt.

The State ex rel. Barthet vs. Judge, p. 434.

CITY OF NEW ORLEANS.

It is the duty of the City Council, as soon as it is practicable, to adopt some plan for draining the entire area of the city of New Orleans, and keeping it free from rain, river and storm water; but the expense of such a system of drainage must be provided for by a local assessment imposed on the property drained.

It is also made the duty of the Council to maintain the cleanliness and health of the city, and to this end they are required to adopt some efficient mode of draining the streets, and of keeping them open and free from obstructions, and of keeping the canals clean and in good repair. But the expense of the same must be raised by *ad valorem* taxation.

One involves a question of local improvement and assessment, and the other of the exercise of the police power in the administration of city affairs.

Davies vs. City of New Orleans, p. 806.

COLLATION.

An heir, to whom slaves have been donated, is bound to collate the value of the same, although slavery was subsequently abolished.

COLLATION—Continued.

The circumstance that no act of donation was executed at the time will not relieve the heir from the obligation of collating, where the donation is admitted by such heir and no one disputes his title, and the slaves, at the opening of the succession of the donor, were not returned as its property, but were retained by the donee.

Collation takes place in all cases in which the donation was not made *hors part*, or as an extra advantage, or part.

Payments made by a father and tutor to the husband of his daughter will not be considered as donations subject to collation, where it appears that, at the settlement of a succession in which the daughter was an heiress, the father and tutor retained in his possession the hereditary share of that daughter, then a minor under his tutorship, such share nearing the amounts paid the husband, the difference being easily accounted for.

Succession of J. Haile, p. 334

COMMUNITY OF ACQUETS AND GAINS.

When both parties to a marriage declared null are shown to have been in good faith, such marriage will have its civil effects as relates to the parties, and among such effects will be included the legal community partnership of acquets and gains which results according to law from a legal marriage.

The community will be dissolved by the judgment which declares the nullity of the marriage; and its liquidation must be effected as would be the case with a community dissolved by the death of one of the spouses

In such a case the property purchased by the husband from the time of the putative marriage, and remaining in his ownership at the date of the declared nullity of the marriage will be treated as belonging to the community.

But being the head and master of the community, the husband owes no account of the proceeds of any community property which he may have sold or otherwise disposed of, or for rents and revenues realized by him from property belonging to the community, during the existence thereof.

An action by a woman for her share in a community alleged to result from a lawful marriage will not sustain the plea of *res adjudicata* to an action by the same person against the same defendant, for the settlement of a community alleged to have resulted from a marriage declared null, between the parties. The cause of action is not the same in the two suits.

Kate McCaffrey vs. John H. Benson, p. 10.

CONSTITUTION.

Under Art. 63 of the Constitution, the term of an officer appointed by the governor during the recess of the Senate, cannot extend beyond the end of the next ensuing session of the legislature; and where the same name is subsequently sent to the Senate and confirmed and a new commission is issued, the latter is a distinct appointment and requires a new bond. *State vs. Powell, et al.*, p. 242.

Because a retailer of spiritual liquors has paid his license he does not become, on that account, exempt from the operation and effect of a police regulation, thereafter ordained by the police jury, in so far as his subsequent act in violation thereof is concerned.

An ordinance passed and promulgated, subsequent to the issuance of a license to a retailer of spirituous liquors, denouncing a penalty of fine against its violation, by such person as shall keep his saloon open after 10 o'clock p. m., is not amenable to the charge of being an *ex post facto*, or retroactive law, unless the act sought to be punished was committed antecedent to its passage.

The State of Louisiana and the Police Jury of the Parish of Jefferson vs. W. J. Isabel, p. 340.

A collateral inquiry into the legality of a tax levy, or assessment apparently legal and valid on its face, cannot be entertained in an injunction suit against the tax-collector alone, and after the levying or assessing officers have become *functus officio*.

Such an inquiry may be gone into and determined in such a suit in case the levy or assessment is void on its face, or made in plain violation of some provision of the constitution or law.

Mrs. Varina B. Gaither vs. T. K. Green, Tax Collector, et al., p. 362.

Any posterior law which has for its object to confer on such creditors as originally possessed no contract rights the prerogatives of those who had, and thereby infringes the latter, is amenable to the objection of impairing the obligation of protected contracts.

The State ex rel. Wood vs. Board of Liquidation, p. 393.

The right conferred on the Gas Light Company by its charter, to lay mains in the streets of New Orleans, does not imply that of erecting lamp posts at the corners of such streets and of retaining them there indefinitely, when it does not furnish the city with gas, and there exists no contract between it and the city to that effect.

The right granted by the city to a party to erect towers or supports to carry wires and cable for electric purposes and to remove obstructions to such erections, cannot be contradicted by one who does not claim a concurrent right.

CONSTITUTION.—Continued.

The city of New Orleans, in the exercise of its police power, has the right of removing such obstructions for public convenience and benefit, and may delegate such power.

New Orleans Gaslight Co. vs. M. J. Hart, p. 474.

CONTESTED ELECTION CASES.

The Constitution of the State makes each house of the General Assembly the sole judge of the qualifications, election and return of its members. Consequently, the district courts are without jurisdiction to determine contested elections touching the right to seats or membership in the Legislature.

Nor have they the power to take depositions of witnesses relating to such contest, nor the authority to cause the ballot boxes to be produced in court and the seals placed thereon by the commissioners of election, to remove the boxes and have the ballots recounted.

Judges can exercise other than strictly judicial powers. They cannot combine with such powers those that properly pertain only to the duties of a commissioner to examine witnesses and take in writing their depositions for the purpose of forwarding them to another tribunal.

The State ex rel. O'Donnell vs. Judges, p. 598.

CONTRACTS.

When manufacturers oblige themselves to furnish machinery to a planter first-class material and workmanship and free from damaging defects, and guarantee the work for one year, and that same shall be erected in their shops, as far as practicable, in order that the planter or his engineer, may inspect the same before their delivery on board of steamboat at the port of New Orleans, for shipment to him, and on due notification he makes the inspection, and thereafter receives and uses said machinery, the burden of proof is on defendant to establish the following facts, viz :

- 1st. That the workmanship and material were not of first-class ; but, on the contrary, same were affected with damaging defects ;
- 2d. To reconcile his apparent, and implied acceptance of the mill and machinery, resulting from his use of same in bearing off his crops, with his claim that some were in many essential particulars defective, both as to workmanship, and material ;
- 3d. To establish by clear, and satisfactory evidence that the mill and machinery had received "*fair usage*" at his hands, otherwise he cannot defeat his contract to pay the price.
- 4th. Holding under such a contract a large and valuable property, the defendant not having the established the *conditions precedent*,

CONTRACTS—Continued.

is not entitled to delay proceedings for the purpose of having heard the evidence of his witnesses as to the *quantum* of damages.

Whitney Iron Works Co. vs. Reuss, p. 112.

Where the cause of the contract sought to be enforced is unlawful and opposed to good morals and public policy there is no right of action in the courts, for either party *suing through it*, to enforce it. But, after the reprobated transaction has become an accomplished fact, neither party can legally interpose such illegality or turpitude as a defense.

An instrument cannot be rejected and disregarded as not evidencing a compromise because it does not contain the formal words "for preventing or putting an end to a law suit." Under our system of practice nothing is sacramental, as a matter of form, unless made so by statute.

The disproportion of the amount received as compared with that of the amount demanded, is no cause for the rescission of the transaction otherwise valid, and same cannot be explained or disclosed by parol evidence.

Error, fraud or the like must be formally averred against it and proved, to avoid it. *C. C. Antoine vs. D. D. Smith, et als.*, p. 560.

A contract which sets forth two distinct considerations, for two different objects, although for one main purpose only, is legally divisible, and will be maintained as valid in part, notwithstanding the other part be absolutely void, as prohibited by law.

Mary E. Glaze, wife, et als., vs. Dusen, sheriff, et als., p. 692.

CORPORATIONS.

The stockholders of a corporation, in the name of which property has been bought on credit, cannot form a new corporation in which their interests are the same as in the old and based on no new consideration, and by transferring the property to the new corporation escape liability to the vendor and creditors at least to the value of the property.

The board of directors of a corporation have the general right to apply its property to the payment of its debts; and a majority of stockholders present, at a meeting regularly convened, with due notice for the purpose, have the right to ratify such action and dissolve the corporation.

But where such action is had through the influence of the president of the corporation, and where the debt to which the property is applied is one for which he is primarily liable, and especially when

CORPORATIONS—Continued.

he has subsequently acquired the property, such circumstances subject his action to severe scrutiny and require of him proof that he acted with candor and fair dealing for the interest of the corporation and without any taint of selfish motive.

The above test is applied to the action of Holbrook, the assignor of defendants, and it is found to stand the ordeal.

Hancock vs. Holbrook, p. 53.

Parol evidence, in a collateral action, cannot be received to contradict the records of a public corporation, which are required by law to be kept in writing, or to show a mistake in the matters therein recorded.

If such record be false, and the corporation will not correct it, a party interested may, by mandamus, compel it to make correction so that it may conform to the truth.

Gaither vs. Green, tax collector, et al., p. 362.

The legal effect of the consolidation of two corporations under the provisions of Act No. 157 of 1874, is a perfect amalgamation which terminates the existence of the consolidating companies as separate autonomies and operates the creation of a new one, thus concentrating in one corporation, the members, the property and the capital stock of both.

The consolidated corporation not only assumes duties and obligations similar to those of the former corporations, but it will be held on the very identical liabilities and obligations incurred by either of the former companies.

Hence, under the amalgamation effected between the New Orleans Gas Light Company and the Crescent City Gas Light Company, the obligation imposed by the Legislature on the former company to furnish gas, free of charge, to the Charity Hospital, adheres to the new or consolidated company, without reference to the term or duration of the charter of said company as previously composed.

Board of Administrators of the Charity Hospital of New Orleans vs. New Orleans Gas Light Company, p. 382.

Under the Constitution and laws of the State of Louisiana, the city of New Orleans is clothed with full and exclusive power to grant franchises for the construction and operation of passenger street railways, by steam or horse power, within her corporate limits, including the right of regulating the rates of fare to be exacted by said corporations for the transportation of passengers.

CORPORATIONS—*Continued.*

The city's discretion in regulating such matters is not subject to judicial control or interference, unless arbitrarily or unlawfully exercised.

B. R. Forman vs. New Orleans & Carrollton R. R. Co., p. 446.

Under the provisions of Act No. 16 of 1875, the city of New Orleans is required to pay certain officers and members of the Metropolitan police, and has no right to deduct disbursements from the taxes collected for that institution for the payment of such parties for services rendered subsequent to the law.

The city of New Orleans is not liable for taxes collected for that force by defaulting sheriffs, simply because it allowed them privileges for accelerating the payment of such and her own taxes from delinquents.

R. F. Harrison, receiver, vs. City of New Orleans, p. 509.

The fact that by the charter of a mutual benefit association a particular method of notice of assessments falling due is declared to be sufficient and binding on all members, does not exempt the corporation from the operation of the principles of equitable estoppel which apply to all other persons natural or juridical.

Forfeitures are not favored by the law; and in cases of insurance, where the company has pursued a course of conduct which leads the insured honestly to believe that, by conforming thereto, his rights will be protected, the company will be estopped from claiming a forfeiture, although incurred under the letter of the contract. Hence, though the charter provides only for notice by posting, yet if the company adopts the practice of always sending written notice by mail to a particular class of members of assessments due, and if on a particular occasion it failed to send such notice, and if the failure to pay was solely due to the want of notice, and if, as soon as informed, payment was tendered, the company is estopped from claiming the forfeiture.

Upon a review of the evidence, the facts of the uniform custom to send notices, and of the failure to send it in the particular case in which default occurred, that this was the sole cause of non-payment and that payment was offered as soon as knowledge was obtained, are found established.

Gunter et al. vs. Mutual Aid Association, p. 776.

An original stockholder who signs without qualification a subscription for new stock to increase the original stock, is not entitled to cancellation of his subscription and no repetition for the amount

CORPORATIONS—Continued.

paid in, on the ground that *all* the new shares were not subscribed for.

In the absence of any stipulation or limitation to the contrary, his subscription is not contingent or dependent upon the taking of all the shares, but is absolute and binds him accordingly.

Germania Savings Bank vs. Peuser, p. 796.

COSTS.

The State as a sovereign, owes no costs in litigation before her own courts, even when cast in a civil suit. *State vs. Richard Taylor, 33 Ann. 1272; State vs. Miles Taylor, 34 Ann. 978.*

Succession of Kate Townsend, p. 66.

CRIMINAL LAW.**APPEAL.**

An appeal in a criminal case will not be dismissed where the transcript is filed within three days after the return day.

To admit of proof a cause or causes suspending prescription pleaded in bar of the prosecution, such cause or causes must be averred in the indictment.

Where a party is prosecuted under an indictment for murder and convicted of manslaughter and the judgment is arrested because on the face of the indictment a prosecution for manslaughter is barred by prescription, the case cannot be remanded to enable the prosecuting officer to amend the indictment by averring facts showing a suspension of prescription.

And where it appears that the accused is protected by prescription from prosecution under a new indictment for manslaughter, the prosecution must terminate and the accused be discharged.

When a party has been indicted for murder and convicted of manslaughter, he stands acquitted of murder and can never be tried again for that offense. *The State vs. Christoval Joseph, p. 5.*

An appeal made returnable on the suggestion of the appellant at an improper place and at an improper time, will be dismissed.

State vs. John Cloud, p. 618.

An appeal made returnable on the suggestion of the appellant at an improper place and at an improper time, will be dismissed.

State vs. Martin Granger, p. 619.

ADJOURNMENT.

Under the provisions of Section 1984 of the Revised Statutes of 1870 a district judge has the discretionary power to adjourn, by a written

CRIMINAL LAW—*Continued.*

order to the sheriff, a regular term of the court, to any day preceding the next regular session, as he thinks proper; and to require the attendance of jurors accordingly.

State vs. Pat Pate, p. 748.

ATTORNEYS AT LAW.

The conduct of counsel who bring up appeals in criminal cases, and give no further attention thereto, is to be deprecated.

State vs. Adams, et als., p. 213.

BAIL.

A person indicted for a capital offense is not entitled to bail on the ground that his case has been continued at the instance of the State, if it appears that the only effect of such continuance is to postpone the trial to the next month after the date for which the trial had been fixed.

An indictment for a capital offense affords sufficient presumption of the guilt of the accused to remove him from the right to bail under the provisions of Article 9 of the constitution.

State ex rel., Rice vs. Butler, Criminal Sheriff, p. 3.

BOND.

The surety on an appearance bond furnished when the accused was in custody, and by which he was released is estopped from subsequently alleging irregularities or other defects of form in the confecton of the bond.

State vs. Hendricks, et als., p. 719.

CHARGE.

The refusal of the judge in a trial for murder to charge the jury that under the laws of Louisiana, "in all trials for murder the jury may find a verdict of manslaughter," in accordance with Section 785 Revised Statutes of 1870, is a fatal error, which will vitiate the verdict found against the accused, and entitle him to a new trial.

State vs. Henry Brown, et. al., p. 725.

Nor can the judge be required to give as a charge the legal maxim *falsus in uno, falsus in omnibus*.

State vs. Adolphus Banks, et al., p. 736.

It is not proper for the trial judge to charge that, if one witness swears positively to the occurrence of a certain fact, and other witnesses, who had equal facilities of witnessing it, swear that, if same had occurred they would have seen it, the latter must prevail. It is necessary that the court should charge, in addition, that such wit-

CRIMINAL LAW—Continued.

nesses exercised such facilities and testified that no such occurrence happened, in order that their evidence should preponderate.

State vs. Gilbert Dorsey, p. 739.

CONTINUANCE.

To entitle an accused to a continuance on the ground of the absence of a witness, he must show due diligence to procure the testimony; and the continuance was properly refused where no subpoena was issued for the witness until the case was called for trial, although the witness resided in the town or city where the court was held.

State vs. Venables, p. 215.

The constitutional provision which guarantees to an accused the right to compulsory process is not a dead letter, and must be enforced.

Under a proper showing for a continuance, on the ground of the absence of a material witness, the trial must be postponed.

Sufficient assistance must be afforded an accused to procure his witnesses. When it does not clearly appear that such was given him in a capital case, the accused is entitled to the benefit of the doubt.

State vs. Adam, p. 745.

In all criminal prosecutions it is the desire, and to the interest of the State, that all reasonable facilities be extended to the accused in the preparation of his defense.

Hence, the accused is not responsible for the error committed by the clerk in issuing *subpoenas* to witnesses for the defense, if it appears that the order for such witnesses had been given in a proper manner by the accused or his counsel, and that the witnesses they ordered are residents of the parish.

A party accused, who discovers on the day fixed for his trial that a material and important witness ordered by him and by whom alone he could establish a fact important or indispensable to his defense, had not been summoned, because the given name of the witness had been by error of the clerk changed into another name, in making out the summons, is legally entitled to a continuance on proper showing for the purpose of procuring the attendance of such witness. For making the discovery on the day of trial only he cannot be charged with want of due diligence.

State vs. Landry Thomas, p. 860.

DISTRICT ATTORNEY.

The State attorney is the representative of the public and the legal adviser of the grand jury, who have a right to call upon him for

CRIMINAL LAW—*Continued.*

advice on questions of law and procedure. Although he has no right to influence or direct them in their finding, or express any opinion on questions of fact, he may assist them in their labors. Surely, his telling witnesses to state to the jury all they know is no improper interference. *State vs. Joseph Adam, p. 745.*

EVIDENCE.

When the accused has made several distinct confessions at different times, the State cannot be required to prove that the first confession was obtained without threats, violence or undue influence before interrogating the witnesses as to other confessions.

The State cannot be controlled in the order of introducing these confessions in evidence.

State vs. Washington and Brown, p. 669.

When conspiracy has once been proved, in the opinion of the trial judge, evidence of the acts and declarations of one of the conspirators in the prosecution of the common design is admissible against all others. Affirming *State vs. Ford, 37 Ann. 443.*

An accomplice jointly accused with other persons, but not on trial, and discharged under a *nolle prosequi*, is a legal or competent witness; the fact of his being an accomplice can affect only his credibility, of which the jury are the sole judges. Hence the trial judge cannot be required to instruct the jury to discredit his testimony unless corroborated by unimpeached evidence.

State vs. Adolphus Banks et al., p. 736.

While, as a general rule, uncommunicated threats are not admissible, yet where communicated threats, followed by subsequent attack and difficulty leading to a killing have been proved, evidence of other threats made between the communicated ones and the assault may be received as corroborating the evidence as to the communicated threats, as indicating their meaning and seriousness, as characterizing the purpose of the assault, as throwing light upon the acts of deceased in connection therewith and as establishing the reality of the danger under apprehension of which defendant may have acted.

State vs. Henry Williams, p. 168.

The competency of objected testimony cannot be determined, if the complaint is first made when the statement of witness is reiterated. Having been once received without objection, it cannot be thereafter recalled.

State vs. Monroe Holmes, p. 170.

In a criminal trial of two parties, jointly indicted for the same offense, the testimony of the wife of one of them is admissible for or

CRIMINAL LAW—Continued.

against the other, under instructions from the trial judge to the jury to restrict such testimony to the case of the other defendant.

In a criminal trial of two parties, jointly indicted, where conspiracy has been proven, in the opinion of the trial judge, the declarations of one of the conspirators, although made in the absence of the other, are admissible against all the defendants.

State vs. W. B. Adams et al., p. 213.

In criminal cases the cross-examination of a witness must be confined to the matters stated by him in his direct examination, or closely connected therewith.

Where, in a prosecution for murder, it was proved that the accused went into the room where the killing occurred with a drawn pistol, he (the accused) may be asked, when on the stand as a witness, what his intention was at the time he entered the room.

Where, upon the trial, there was testimony to the effect that the killing was accidental, the trial judge is not justified in refusing to charge the jury on the subject of accidental killing, and of negligence or non-negligence connected therewith upon the ground that he did not believe the evidence. *State vs. Tucker*, 38 Ann. 536, reaffirmed.

State vs. Geo. C. Wright, p. 589.

EXCEPTIONS.

In considering bills of exception which contain conflicting recitals by counsel and by the trial judge, the Supreme Court will be guided by the statements made by the judge.

State vs. Jessie Young, p. 483.

A ruling of the trial judge cannot be reversed, unless the bill of exceptions makes such showing of the facts and circumstances as will enable this Court to decide that he erred.

State vs. Thomas Tiernan, p. 525.

FORGERY.

A writing of the following tenor: "Prime Wingard, 507 I. cot. T. T. P.," is such in form as to be apparently of some legal efficacy, and may serve as a basis for a prosecution for forgery, uttering, etc.

State vs. Primus Wingard, p. 733.

GRAND JURY.

Under the effect of such an order the first day of the actual session becomes the first day of the regular jury term for that month, within the contemplation of Section 6 of Act 44 of 1877, requiring that the Grand Jury be drawn on the first day of the regular term.

CRIMINAL LAW—*Continued.*

A Grand Jury thus drawn is a legal body, and a motion to quash an indictment presented by that body, on the ground of illegality in the organization thereof, cannot prevail.

State vs. Pat Pate, p. 748.

INDICTMENT.

In order to justify the admission of proof to show in what the forgery consists, it was unnecessary to make specific averment to that end in the indictment.

State vs. Primus Wingard p. 733.

If, in a criminal case, it appears from the whole tenor of the proceedings, that an indictment against several persons therein charged jointly with an offense, properly endorsed as against "A and als" was presented in open court by the grand jury, the fact that, in his minutes of the day the clerk erroneously copied the title so as to make it read as against "A" only, cannot vitiate the proceedings.

State vs. Adolphus Banks et als., p. 736.

A description in an indictment for larceny of the property stolen, as "some bottled beer, of the value of two dollars and fifty cents," is insufficient, and being a matter of substance, a motion in arrest of judgment will be sustained.

State vs. Robert Hoyer, p. 744.

Under the effect of such an order the first day of the actual session becomes the first day of the regular jury term for that month, within the contemplation of Sec. 6 of Act 44 of 1877, requiring that the Grand Jury be drawn on the first day of the regular term.

A Grand Jury thus drawn is a legal body, and a motion to quash an indictment presented by that body, on the ground of illegality in the organization thereof, cannot prevail.

State vs. Pat Pate, p. 748.

An information charging a statutory offense is sufficient, if in the terms of the statute.

State vs. Monroe Holmes, p. 170.

JUDGMENT.

A motion in arrest of judgment should concisely state the defects complained of as being patent upon the face of the record.

State vs. Gilbert Dorsey, p. 739.

JURISDICTION.

The Supreme Court has no concern with the evidence adduced before the jury touching the innocence or guilt of the accused. It deals with questions of law only, when presented in proper shape.

State vs. Joshua Perkins, p. 210.

CRIMINAL LAW—*Continued.*

JURY.

The right of a person accused of a crime, that is triable under Act 35 of 1880, by a jury of five, to peremptorily challenge *six* jurors, was decided in *State vs. Everage*, 33 Ann. 120, adversely to the defendant's pretensions, and correctly. That decision is therefore affirmed. *State vs. Peter Demouchet*, p. 205.

When a party is indicted and notice of the *venire* list is served on him, and the indictment is afterward *nolle prossed* and an information is filed against the accused at the same term of court charging the same offense, it is not necessary to again serve a copy of the *venire* on the accused.

State vs. Cyriaque Washington and Cleophile Brown, p. 669.

An objection to the effect that the names of persons who are summoned as tales jurors were not written on ballots and placed in the *venire* box and drawn therefrom, but that same were called from a list that was made out and furnished to the counsel by the sheriff, will not prevail in case it appears that the entire list was exhausted before the panel was completed.

The expression of opinion which disqualifies a juror is a *fixed, deliberate and determined* one, and which will not yield to evidence.

An objection that a juror held a whispered conversation with a person not connected with the court, and in the presence of the judge and the defendant's counsel, cannot avail the accused as a disqualification of the juror. He had the opportunity of requesting the judge to discharge the jury, and did not, and his complaint comes too late, after he has enjoyed the opportunity of an acquittal.

As a rule it is safer to exclude spirituous liquors *entirely* from the use of the jury in a capital case, yet if the proof shows that no injurious consequences followed from its use, no ground is furnished for the allowance of a new trial. *State vs. Gilbert Dorsey*, p. 789.

It is not misconduct on the part of a jury to procure and read law-books *after* they have concluded their deliberations, and decided upon their verdict, although it has not been formally *rendered* in open court. *State vs. Elbert Wilson*, p. 751.

NEW TRIAL.

An accused cannot be allowed, in a motion for a new trial, to urge surprise at the reception of certain testimony during the trial, when he, at the time, sought for no relief. His omission implies a waiver of what right he may have had on that score.

CRIMINAL LAW—*Continued.*

The absence of a witness affords no ground for a continuance or new trial, when it appears that the testimony would be hearsay, and if admitted, would have been merely contradictory in part, with a tendency to impeach the credibility of witnesses on the trial.

State vs. Joshua Perkins, p. 210.

Motions for new trials are left largely to the discretion of the trial judge, and unless the record makes it apparent that his discretion has been unwisely or arbitrarily exercised, his rulings thereon will not be disturbed.

State vs. Abe Venables, p. 215.

PERJURY.

To constitute perjury, it is essential that the false swearing should have been committed with respect to some matter over which the Court had jurisdiction.

So where the alleged false oath was taken before a justice of the peace, and the oath administered by him in an examination by or before such justice in a prosecution for burglary, such false swearing could not be perjury, because for such a crime, and others punishable with death or imprisonment at hard labor, a justice of the peace in the country parishes is without jurisdiction to conduct such examination. This proceeding is exclusively committed by law to the district judge, and he cannot delegate his authority to a justice of the peace. Where the false swearing is not perjury, a charge of subornation of perjury cannot be based upon it.

State vs. John Wymberly, p. 460.

SENTENCE.

When an accused person is charged in separate counts with burglary and larceny and he confesses himself "guilty as charged," it is competent for the judge to sentence him to one term of imprisonment for the commission of burglary, and to another term for the commission of the larceny—the latter to begin at the expiration of the former.

State vs. Caesar Robinson, p. 730.

VERDICT.

Under the provisions of Section 1056 R. S. on the trial on a charge of larceny, the jury, if the facts warrant it, can return a verdict against the defendant, "not guilty of larceny but guilty of embezzlement." Such a verdict is not in conflict with Articles 5 and 8 of the Constitution of 1879.

State vs. Solomon Williams, Jr., p. 732.

CRIMINAL LAW---*Continued.*

Because inartificial expressions and words are employed in framing a verdict by the jury, the same will not be annulled and set aside, if same are sufficient in terms to reasonably convey the idea intended. The rule *idem sonans* is applicable.

State vs. Elbert Wilson, p. 751.

To a charge of shooting with intent to commit murder, a verdict returning guilty of an assault with a dangerous weapon, is not responsive.

State vs. Louis Allen, p. 199.

A verdict may be legally rendered, received and recorded, where the accused voluntarily leaves the court room and fails to appear after the sheriff's proclamation to come and hear the verdict about to be rendered. He cannot be permitted to take advantage of his own wrong to defeat the ends of justice.

State vs. Joshua Perkins, p. 210.

The crime of shooting with intent to murder *while lying in wait*, denounced by Sec. 790, R. S., and that of shooting with intent to murder, without the circumstance of *lying in wait*, denounced by Sec. 791, not only belong to the same generic class, but every element of the lesser offense is necessarily included in a charge of the greater, which simply adds the aggravating circumstance of *lying in wait*.

Under an indictment for the major, the prisoner could be convicted of the lesser crime, proof of the first necessarily involving proof of the last.

The authorities fully sustain the right of the State to abandon or enter a *nolle prosequi* as to the aggravated circumstance enlarging the crime and to proceed under the indictment for the lesser offense alone.

This does not alter or amend the indictment or convert it into an indictment not found by the grand jury. The minor offense was charged in the bill as found equally with the major.

After such abandonment there was no necessity of a new service of the indictment.

There was no error in permitting the original indictment to be read by the jury, with the accompaniment of the entry on the minutes showing the abandonment of the aggravating circumstance.

The verdict is to be construed as responsive to the indictment as modified.

State vs. Evans, p. 216.

CRIMINAL LAW—*Continued.*

WITNESSES.

In all criminal prosecutions it is the desire, and to the interest, of the State, that all reasonable facilities be extended to the accused in the preparation of his defense.

Hence, the accused is not responsible for the error committed by the clerk in issuing *subpoenas* to witnesses for the defense, if it appears that the order for such witnesses had been given in a proper manner by the accused or his counsel, and that the witnesses thus ordered are residents of the parish.

A party accused, who discovers on the day fixed for his trial that a material and important witness, ordered by him, and by whom alone he could establish a fact important or indispensable to his defense, had not been summoned, because the given name of the witness had been by error of the clerk changed into another name, in making out the summons, is legally entitled to a continuance on proper showing, for the purpose of procuring the attendance of such witness.

For making the discovery on the day of trial only, he cannot be charged with want of due diligence.

State vs. Landry Thomas, p. 860.

COURTS.

After the intent and meaning of a law has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the law as text itself, and a change in the construction is the same in effect on contracts as an amendment of the law, by means of a legislative enactment.

Levy vs. Hitsche, p. 500.

DAMAGE.

On the dissolution of an injunction, arresting an order of seizure and sale, not a money judgment, damages cannot be allowed.

Boyer vs. Joffrion, sheriff et als., p. 657.

When two causes co-operate to produce the damage resulting from a legal injury, the proximate cause is the originating and efficient cause which sets the other cause in motion.

The duty of care and of abstaining from the unlawful injury of another applies to the sick, the weak, the infirm, as fully as to the strong and healthy; and when that duty is violated, the measure of damages is the injury done, even though such injury might not have resulted but for the peculiar physical condition of the person injured, or may have been aggravated thereby.

DAMAGE—Continued.

Thus, though the damage done to a child by an injury appears to be aggravated by a latent hereditary hysterical diathesis, which had never exhibited itself before the accident and might never have developed but for it, the party in fault will be held for the entire damage as the direct result of the accident.

Lapleins vs Railroad and Steamship Co., p. 661.

Corporations must be sued at their domicile for damages arising from the passive breach of their obligations, such as negligence and nonfeasance.

The law as expounded in 30 Ann. 607; 33 Ann. 954; 36 Ann. 186; 39 Ann. 1066, as to the interpretation of Sec. 9, Art. 165, C. P., re-affirmed.

Galdwell vs. Railroad Company, p. 753.

To recover damages for injuries received from a railroad company, it is necessary for plaintiff to prove that the accident, in consequence for which the injuries were received, was caused by the negligence of the railroad company, and that the plaintiff was not guilty of any negligence which created or aided in the accident.

Deikman vs. Railroad and Steamship Co., p. 787.

Passengers crossing a railroad track at a station, in order to leave or board a train halted for that purpose, are not held to the exercise of the same care and diligence which are ordinarily exacted from persons crossing tracks, but are authorized to assume that the railroad corporation will so order its trains that he will be safe from harm on the track which he is thus invited and required to cross in order to secure his passage.

But where a person attempts to board the train while moving, and after it has left the station, he no longer acts on the invitation or stands under the protection of the company, and, while crossing or occupying the track, is bound to use proper care for his own protection.

Evidence discussed and conclusion reached that the injured party here was subject to the last mentioned rule.

Having thus negligently stood upon the track in full view of the approaching train, which rang its bell and sounded its whistle, and having failed to use his senses in his eager absorption in the attempt to board a moving train, in itself an improper and indiscreet act, he must be held guilty of contributory negligence, which debars recovery.

Weeks, tutrix, vs. Railroad Co., p. 800.

A railroad company, running and operating its road through the

DAMAGE—Continued.

streets of a populous city, is bound to observe extraordinary precautions for the safety of the public, particularly at street crossings. Where these precautions are omitted by the company, and a party is injured and there is no concurrent contributory negligence on his part, the company will be held liable.

Curley, tutrix, vs. Railroad Co., p. 810.

In dealing with matters of litigation growing out of the construction of railway law, in connection with railway accidents, the Supreme Court of Louisiana will endeavor to place its rulings in line and in harmony with the adjudications of the Supreme Court of the United States, and of the courts of last resort of the States of the American Union, in all cases in which they do not conflict with the special and exceptional system of laws prevailing in Louisiana.

In cases involving the responsibility of a common carrier, such as a railway company, for injuries sustained by one of its passengers, the porter, and other employees of a Pullman Car Company, forming part of the railway company's train, will be considered as the servants and employees of the railway company.

Their negligence, or the negligence of either of them, as to any matters involving the safety and security of passengers, while being conveyed, is the negligence of the railroad company. *Pennsylvania Company vs. Roy*, 102 U. S. 451; *Thorpe vs. N. Y. & H. R. R. Co.*, 76 N. Y. 402.

A railway company is liable in damages for a wanton and malicious assault by one of its servants on a passenger. 57 Maine, 202, Goddard's case.

A railway company is responsible for injuries received by one of its passengers at the hands of a porter of a sleeping car, forming part of the railway company's train, if it appears that said passenger was not a trespasser on the sleeping car.

Williams vs. Pullman Palace Car Co. et als., p. 417.

This is an action for damages occasioned to a policeman while on duty at the New Orleans National Bank, in this city, by an explosion of a part of the apparatus appertaining to its electrical installation. It comes fairly within the principle of the Code, that is to the effect that every one is "responsible not only for the damage occasioned by his *own* act, but for that which is caused by the *things* which he had in his custody" or control.

Yates vs. Electric Light and Power Co., p. 467.

A servant must be held to have accepted the service of his employer,

DAMAGE—Continued.

subject to such reasonable risk as may be incidental to the character of the employment; and within that limitation he cannot be awarded damages for the occurrence of an accident, or resulting injury.

An employee engaged in a hazardous enterprise cannot be required to give a laborer a positive guarantee against danger and injury which may be suffered from *accidental* and *fortuitous* causes.

A servant, necessarily, assumes the risk *only* of such hazards as are apparently incidental to an employment intelligently undertaken; and if he be aware that proper precautions have not been taken for his safety, and still continues the service, notwithstanding the risk, he will be considered as having assumed the responsibility of his own security. *Smith vs. Sellars & Co., p. 527.*

The obligations of a sleeping car company for injury to a stranger who enters the car for the purpose of asking the privilege of washing his hands and is there, wantonly and without provocation, assaulted and beaten by the porter of the car, is not governed by the principles regulating the liability of common carriers, under the contract of carriage, for like assaults committed by their servants on their passengers. The two cases discriminated and authorities reviewed.

The obligation of the company in such a case being independent of any contractual relations is governed by the general principle of the law of master and servant common to all systems of law and formulated in Louisiana Civil Code as extending to all "damage occasioned by their servants in the exercise of the functions in which they are employed."

The earlier doctrine that "in general a master is liable for the fault of or negligence of the servant, but not for his wilful wrong or trespass," has been greatly modified in modern jurisprudence, which places the test of the master's liability, not in the motive of the servant or in the character of the wrong, but in the inquiry whether the act done was something which his employment contemplated, and which, if properly and lawfully done, would have been within the scope of his functions.

The facts that the party injured was not a trespasser, but was lawfully on defendant's property and was properly dealing with defendant's servant as a servant, do not suffice to fix defendant's liability, if the assault was wanton and entirely foreign to the functions committed to the servant; otherwise a bank, or a merchant, or a householder, would be liable for wanton assaults committed by their

DAMAGE—Continued.

clerks or servants upon customers or visitors, which liability would clearly not exist unless the masters were guilty of fault in employing so dangerous a servant.

The evidence establishes that the porter offending in this case had been in defendant's employment for three years, and had always conducted himself properly and bore a good character for amiability, sobriety and politeness; that porters are mere menial servants, having no police authority whatever, and no connection with the enforcement of the rules of the service except to report violations of them to the conductor, and that he had no authority to use violence towards any person for any purpose whatever. Hence, this wanton assault was entirely foreign to the functions of his employment, and defendant cannot be held responsible therefor.

Ratification of an unauthorized and unlawful act can only be inferred from acts which evince clearly and unequivocally the intention to ratify and not from acts which may be readily and satisfactorily explained without involving such intention. In this case, there being no witnesses, and plaintiff and the porter giving very different accounts of the affair, ratification of the misconduct imputed by plaintiff cannot be inferred from the retention of the porter, when the defendant so acted because it honestly believed the latter and thought it just to maintain the *status quo* at least until judicial determination of the conflict. Nor is the case affected by the fact that the porter was criminally convicted of assault and battery, when in such a trial the porter was not heard as a witness in his own defense, and when he might have been so convicted on evidence falling far short of the outrage charged by plaintiff.

Williams vs. Railroad Co., p. 87.

The claim of the widow and children of the deceased for damages was properly presented in a single suit.

It is indispensable to an employer's exemption from liability to his servants for the consequence of risks incurred, that he should be free from negligence. He must furnish the servants the means and appliances which the service requires for its efficient and *safe* performance; and if he fail in that respect, and an injury result, he is liable to the servant.

Clairain, individually and as tutrix, vs. Western Union Tel. Co., p. 178.

At the request of a customer a country merchant telegraphed to his New Orleans merchant to ship two barrels of bisulphate of lime, the dispatch being addressed to 291 Rampart street. This street has two divisions, known as North and South Rampart street, each

DAMAGE--Continued.

having a No. 291. The name not appearing in the directory, the defendant's messenger carried the dispatch to 291 North Rampart, and being informed by the servant that S. Kahn lived there, left the dispatch and accepted the receipt of the householder. It turned out that Kahn lived on South Rampart; the dispatch did not reach him and the goods were not sent. Plaintiffs, at whose request the country merchant sent the dispatch, were sugar planters who required the bisulphate to save their cane, which had been frosted, and they sue defendant for \$2500 for sugar and molasses lost. *Held:*

1. There was no privity between plaintiffs and defendant, the evidence showing that the country merchant acted, not as agent, but as merchant seeking to supply himself with goods in order to sell the same to a customer at a profit, and that the goods, if shipped, would have remained his property and at his risk until sold to the customer at a price agreed.
2. The failure to deliver resulted from the insufficient and incomplete address, and from no negligence of defendant, who pursued the customary and only practical method of conducting its business.
3. The damages claimed are too remote and wanting in causal connection. There is no reason why the default of a telegraph company in delivering an order for goods should be visited with heavier penalty than the default of a common carrier in the delivery of goods actually shipped, viz: the value of the goods at the point of destination.

Deslottes et al. vs. Baltimore and Ohio Telegraph Co., p. 183.

Under a contract with reference to a public market by which the sole right conveyed by the city to the third person is the right to collect and appropriate the market revenues, the market remaining subject to all the regulations, control and authority of the city applicable to every other market, the *thing let* is not the market-house, but only the privilege or franchise of receiving the revenues, the market remains the premises of the city and not of the lessee, and the latter does not incur the obligations of a tenant of property to keep the premises safe for those lawfully entering thereon.

When, however, a person has, by contract with public authority, assumed obligations to keep a public highway or other public place in repair, he may be held liable to one who has been specially injured by reason of his failure to perform such obligation.

DAMAGE—Continued.

In such case plaintiff must prove : 1. That defendant has been guilty of legal fault. 2. That such fault was the cause of the accident. When the evidence fails to show that the fault imputed to the defendant was the cause of the injury, and makes it probable that the injury resulted from a different cause, which operated independently of the fault, defendant cannot be condemned.

Warranty is a covenant, express or implied, arising out of a contract. A person sued for a *quassi offense* is responsible only on the ground that he has committed a fault, and he cannot call another to warrant him against responsibility for his own faults.

Weymouth vs. City of New Orleans and J. T. Aycock, p. 344.

In this action for malicious prosecution the evidence fails to establish that the defendant acted with malice and without probable cause, which are essential to support such a suit.

Dearmond vs. St. Amant, p. 374.

In an action in a court of Louisiana, on a bond of injunction or for a restraining order, issued in and by the order of a Federal Court in a chancery suit, conditioned to secure the defendant in such a suit against all damages which he may suffer from the injunction or restraining order in case the same may be decided to have wrongfully issued, counsel fees incurred for the dissolution of such an injunction may be claimed and recovered as an element of the damages contemplated by the parties to the bond.

But the allowance cannot include the entire amount of fees paid by the obligee to his attorney in the entire litigation, including the issue on the merits of the cause.

Aiken et al. vs. Leathers et al., p. 23.

It is not within the scope of the employment of a baggage-master connected with a railway train, but not shown to have been put in charge of the same, to invite or permit any person or persons to enter and ride on a coach of such train. Permission given in such circumstances cannot create the relation of carrier and passenger between the company and the person thus riding on such car. The company is not liable to such persons for injuries which they may receive, unless for negligence or tortious acts on the part of the company.

A railway company is not bound to the same degree of care in regard to mere strangers who are unlawfully upon its premises that it owes to passengers conveyed by it.

A railway company is not liable to a person, whether passenger or

DAMAGE—Continued.

trespasser, who in a state of panic or fear jumps out of a train in motion, and is injured thereby, in the absence of proof that such panic or fear was caused or inspired by word or act by an agent or employee of the company.

Reary vs. Railway Company, p. 32.

A suit for hypothetical damages, not yet sustained and which may never be suffered, cannot be countenanced.

In a suit against the succession and the surety of a notary, to hold them liable on account of the latter's failure to register seasonably an act of mortgage, another act having been in the meantime recorded, cannot be sustained when it is not alleged that the property has proved insufficient to pay the claims, or that the drawer of the note and the succession of the notary are insolvent; that the debt has not been paid, in whole or in part, and that injury has been suffered.

It is not until such facts are alleged and proved and the dereliction of duty by the notary is established that damages, like those claimed, can be recovered.

Dwyer vs. Woulfe et als., p. 46.

A railroad company is not responsible in damages for ejecting a passenger on the ground that the ticket which he tenders for his fare had expired by limitation under its very terms, at the time that it was tendered.

A stipulation in a ticket sold as good for thirty days, that the purchaser shall have himself identified as such at the terminal point of his journey, and that the ticket shall be good fifteen days only after date of identification, is not illegal or unreasonable, but is binding on the party who thus contracts with the company.

A party suing on such a contract, and alleging the same, will not be allowed by parol to prove a different contract.

Rawitzki vs. Railroad Company, p. 47.

While courts may allow even liberal compensatory damages against railway companies, in cases of gross fault and negligence on their part, resulting in severe injuries to the passengers whom they have, for due consideration, undertaken to carry safely, those corporations surely are entitled to protection against exaggerated and apparently stale claims, where the injury received or damages suffered is slight or nominal. In such instances the allowance made ought to be merely just and reasonable.

Maher vs. Railway Company, p. 64.

DEPOSIT.

The depositor becomes the ordinary creditor of the bank unless he makes a deposit in kind, as defined by the Code. Civil Code, Arts. 2940, 2943, 2944, 2945, 2963, 3522; 9 La. p. 50; 17 La. p. 162; 10 Ann. p. 342.

Louisiana Savings Bank and Safe Deposit Co., in Liquidation, p. 514.

DOMICILE.

A party who resides in this State with the intention of fixing here his domicile for an indefinite period of time and engages in active business pursuits for a number of years acquires a domicile in the place in which he has thus lived, which becomes the conjugal domicile, if, in the meantime, he contracts marriage even in a foreign country with a wife, whom he brings to his residence and who lives here with him a number of years.

The wife who visits and sojourns in her native country and refuses to return to the domicile thus established, is amenable to the courts of this State in an action for separation from bed and board by the husband for her alleged abandonment of the conjugal domicile.

Larqué vs. His Wife, p. 457.

DONATIONS.

The provisions of Articles 1497 and 1533, C. C., prohibiting donations of the whole of one's property without reserve of sufficient for subsistence, and also prohibiting the reservation of the usufruct of the thing given by the donor in his own favor, embody rules peculiar to donations *inter vivos* and have no application to onerous contracts.

The effect of Art. 1526, C. C., is to divide onerous and remunerative donations into two classes: one in which the value of the consideration, charges and services is less than one-half the value of the object and in which, therefore, the act partakes more of the character of a donation than of an onerous contract; and the other in which the value of the consideration exceeds one-half the value of the object and in which the act partakes more of the character of an onerous contract. The first are treated as donations and subjected to the peculiar rules governing them; the latter are treated as onerous contracts and are governed by the different rules applicable thereto.

Finding that, under the view most favorable to plaintiff, the contract sought to be annulled can only be treated as a disguised onerous and remunerative donation in which the value of the consideration, charges and services exceeded one-half the value of the ob-

DONATIONS—*Continued.*

ject, it stands as an onerous contract and is subject to no vice applicable to such contracts which would authorize its annulment.

Succession of Dopler or Dobfle vs. Feigel and Husband, p. 848.

Bonds payable to bearer, and title to which is transmissible without indorsement or assignment, but by simple delivery, may be the objects of a manual gift, and are not required to be donated by authentic act. This sort of donation is subject to no formality.

Property donated must be appraised at its value, at the death of its donor, and fictitiously added to the property owned by him, at his death, in order to ascertain the disposal portion.

Excessive donations are not null, but reducible.

Donations, in excess of the disposal portion, produce no effect, for the surplus.

When the property donated is *less* in value than the disposal portion, and that portion has been bequeathed to the donee, the latter is entitled to the difference from the estate of the testator.

A husband may give to his *first* wife that which he can to a stranger, but not more. In case of an excessive donation to her, the donation may be reduced at the instance of the forced heirs, whose *legitime* has been encroached upon, but only to make it good.

Succession of Moore, p. 531.

DONATIONS AND TESTAMENTS.

In an action by forced heirs to annul a sale by their ancestor to one of their co-heirs of an immovable for a stipulated price for cash, parol evidence is admissible to show that the real consideration of the conveyance was the obligation undertaken by the heir to support the aged ancestor and his wife during their natural lives. Such an obligation is in law a sufficient consideration for the conveyance.

Such a contract is really a donation *inter viros* with an onerous condition, and such a donation can never be reduced below the expenses incurred by the donee to perform the charges.

Landry et al. vs. Landry et als., p. 229.

ESTOPPEL.

Rules applicable to estoppels *in pais* cannot always be invoked in cases of estoppels by recitals, particularly in judicial proceedings.

The law holds parties to their allegations of record, and does not permit them to falsify what they solemnly declared to be the fact.

The only means by which courts can protect the integrity of judicial proceedings, is the sanctity which the law throws around them.

To the rule there are exceptions, within which this case does not fall.

ESTOPPEL—Continued.

A party, who has judicially declared to have sold property to married women, authorized by their husbands and purchasing for *themselves*, will not be heard subsequently to say that he sold the same to the husbands and to claim from them a deficiency between the notes and the proceeds of the real estate under judicial authority.

Gaudet vs. Gauthreaux et als., p. 186.

In matters affecting the execution of contracts, the doctrine of estoppel has no use or significance when the contract has been complied with; it is only in cases of non-compliance that the question arises whether the other party has, by his representations or course of contract, estopped himself from setting up such non-compliance as a ground of forfeiture.

Gunther et al. vs. Mutual Aid Association, p. 776.

EVIDENCE.

It is improper for the report of auditors to be admitted in evidence before it has been duly homologated. The proceedings for the homologation of the report of auditors constitute a trial of its accuracy and sufficiency to be admitted in evidence.

McNair vs. Gourrier, executrix, p. 353.

The minutes of the proceedings of the Board of Commissioners of the Fifth Levee District, wherein a five mill district levee tax appears to have been levied, are to be taken as of unquestionable verity, and are not to be attacked, and proof entered into, in a collateral proceeding to which said commissioners are not made parties, to show that they are false.

Gaither vs. Green, tax collector, p. 362.

The recitals contained in a deed that is offered in evidence in proof of title, cannot be considered as evidence of the domicile of the parties when it is a necessary element of title. In this case their domicile should be affirmatively proved.

Heirs of Dohan vs. Murdock, p. 376.

In a suit by the father of a minor child for the latter's separate use and benefit, the mother is not disqualified as a witness, because she does not testify for or against her husband but for or against the child, and the case is not affected by the provisions of law giving to fathers and mothers the enjoyment of the estate of their minor children.

Lapline vs. Railroad and Steamship Co., p. 661.

The proceedings of police juries must be kept in writing.

EVIDENCE—Continued.

The minutes of their proceedings make up a public record imparting absolute verity, and they cannot be attacked or contradicted in a collateral action to which the board are not made parties. Nor can their secretary in such an action be required to correct alleged errors, or supply alleged omissions in their minutes.

State ex rel. McClendon vs. Simmons, p. 758.

A party who has been administrator of an estate, obtained the order of sale under which the property was sold to pay debts, and inaugurated and consummated the proceedings complained of in an action of nullity, cannot be permitted to impeach them by his own testimony. Such a person cannot be permitted to impeach his own official acts, nor to contradict the judicial proceedings had in the course of his gestion.

Linman vs. Riggins, p. 761.

The familiar rule of jurisprudence, which authorizes, on cross-examination, the leading questions by one of the parties to the witnesses of his adversary, is not affected or modified in a case where third parties have intervened, who oppose both the plaintiff and the defendant, and where, in some features of the controversy, the plaintiff and the defendant have a point of interest in common and adverse to the intervenors. Under an issue joined between them plaintiff and defendant have the undisputed reciprocal right to cross-examine their opponent's witnesses. A motion to strike out the testimony of a witness, on the ground that by his absence or fault the witness deprived the opposite party of the opportunity to complete his cross-examination, falls within the scope of the legal discretion vested by law in trial judges, whose rulings on such points will not be disturbed on appeal unless glaringly erroneous and unjustly arbitrary. Succession of Reiger, 37 Ann. 104.

Extra judicial statements of deceased persons have always been ranked as the weakest evidence, and when reported to have been made to single witnesses, in the presence of no one else, generally disregarded.

Succession of Kate Townsend, p. 66.

Additional and extraneous evidence, not offered on the original trial of the suit, cannot be introduced on the trial of an application for a rehearing, unless it is based wholly or in part, on the ground of it being newly discovered testimony.

Mayewski vs. His Creditors, p. 94.

Parol evidence cannot be received to create or destroy a title to immovable property, or to prove an agency to buy or sell such property.

EVIDENCE—Continued.

Where immovable property of an interdict (a lunatic) has been sold under regular proceedings, preceded by a valid order of a competent court, and the *proces verbal* shows an observance of the required formalities, and a valid adjudication for an adequate consideration, parol evidence is inadmissible to prove that the proceedings and adjudication were not intended to convey the property to the adjudicatee, but that he was merely interposed to hold the naked title, in order that he might convey it to another.

McKensie et als., vs. Bacon et als., p. 158.

A husband cannot testify in a case in which his wife has an interest involved.

Johnson & Co. vs. Boice & Frellsen, p. 273.

The unimpeached and positive testimony of the lender that he lent to the borrower, and that he had no previous communication with any one else on the subject, outbalances altogether that of another witness, however respectable, who practically testifies from hearsay.

Seixas, syndic, vs. Gonsoulin et als., p. 351.

EXECUTORY PROCESS.

A decree for executory process is not a judgment in the strict sense of the term. It decides nothing, but may be appealed from.

It is an *ex parte* order which may be rendered at chambers as well during vacation as during term time.

Act No. 86 of 1866 was not designed to prohibit the granting of such orders. It proposed to continue in the courts the power of hearing and determining contradictorily, during vacation, motions to quash conservatory and other writs on the face of papers and not on the merits and suits to eject tenants.

Act 86 of 1866, which purported to enlarge the powers of the courts of New Orleans, as then composed, so as to authorize the hearing, during vacation, of motions to quash certain writs and orders, which are issued *ex parte*, has no reference to orders of seizure and sale, which are regulated exclusively by Art. 63 and Articles 732, et seq. of the Code of Practice.

Folger et al. vs. Roos, p. 602.

EXECUTORS, ADMINISTRATORS, TUTORS, Etc.

The law does not require that proceedings be instituted to remove an executor who has failed to furnish security, when ordered to do so, under the provisions of Article R. C. C. 1766. The law is self-operative.

The failure to furnish the security within the delay fixed, *ipso facto* removes the delinquent. A vacancy is thereby created instantly,

EXECUTORS, ADMINISTRATORS, TUTORS, ETC.—Continued.

which can be filled, after due notice, by the appointment of a dative executor. *Succession of Guidry, p. 671.*

The law makes it the imperative duty of administrators of successions to see to and provide for the payment of succession debts, and, when necessary, to provoke the sale of the property, movable and immovable for that purpose.

This duty cannot be paralyzed by the mere judicial denial by an heir that the debts acknowledged by the administration are truly due.

Lehman, Abraham & Co. vs. Worley, administrator, p. 620.

In the absence of prayer and proof that a dative executor had received sums of money from the executor, his predecessor, no judgment can validly be rendered against him.

In order to recover from such predecessor, suit must be brought against him or, in case of his death, his succession.

Succession of Gagneaux.—On Oppositions to Accounts, p. 701.

There is no legal prohibition against, but there is a legal permission granted to an administrator to purchase property at a probate sale of the effects of the succession he represents, *provided*, he be the surviving partner in community of the deceased.

Linman et al. vs. Riggins, p. 761.

Where, on the opposition to an executor's account, the same has been amended by placing the opponent thereon as a creditor of the succession then under administration, the executor in his representative capacity has an appealable interest in the judgment on the opposition, and if he deems it unjust has not only the right to appeal but it is his duty to do so.

Succession of Cassidy, p. 827.

EXPERTS.

During the progress of the trial it is improper to appoint *ex parte* a single expert, when there is no professional opinion to be given on any question on the decision of which the case depends.

McNair vs. Gourrier, executrix, p. 353.

An expert appointed by a party to make researches deemed necessary for his defense, must be paid by that party.

Harrison vs. City of New Orleans, p. 509.

FORCED HEIRS.

In an action by forced heirs to annul a sale by their ancestor to one of their co-heirs of an immovable for a stipulated price for cash parol evidence is inadmissible to show that the real consideration of the conveyance was the obligation undertaken by the heir to

FORCED HEIRS—Continued.

support the aged ancestor and his wife during their natural lives. Such an obligation is in law a sufficient consideration for the conveyance.

Such contract is really a donation *inter vivos* with an onerous condition, and such a donation can never be reduced below the expenses incurred by the donee to perform the charges.

Landry et als. vs. Landry et als., p. 229.

FRAUD.

The right to avoid titles to property on the ground of fraud must be exercised within a reasonable time after discovery, especially where the property is of fluctuating value dependent upon successful administration; the party cannot await the event, and then claim the profit.

The institution of a suit not prosecuted may save the action from this equitable bar, but the plaintiff's neglect of his duties as director, failure to interpose for the prevention of the transactions while they were, to his knowledge, in course of consummation, and his inaction until the death of the principal actor, whose title he attacks, subject his claims to scrutiny and adds to the burden of proof resting on him.

Transactions which only accomplish justice, which are done in good faith and operate no legal injury, lack the characteristics of fraud.

Hancock vs. Holbrook et al., p. 54.

This case hinges mainly on questions of fact.

It was sought to hold the defendant bank liable for the contents of a bank-box for wrongfully delivering the box, and to recover from Ringrose and Washburn the contents of said box, amounting to \$100,000, which they are charged with having appropriated.

Held: the bank, having delivered the box to the bearer of the ticket or card which called for the delivery of the box to "bearer" had legally complied with the contract, and was therefore exonerated from all responsibility in the premises.

Held: as to Ringrose and Washburn, the evidence having entirely failed to show that the box in suit contained any money or values, as alleged by plaintiffs, or to connect either of these two defendants with any spoliation of that or any another box belonging to the succession of Fisk, no recovery could be had as against them.

Fisk et al. vs. National Bank et als., p. 820.

GARNISHEE.

The garnishee admits that he has a specific sum in his hands which he received from the defendant, but alleges that he received and

GARNISHEE.—*Continued.*

holds it for his mother, and, therefore in answer to interrogatories, denies indebtedness to defendant or possession of any property belonging to him. The mother intervened in the suit and asserted her right to the fund. On a traverse of garnishee's answers, judgment was rendered against him but simply ordering him to deliver the fund into the Sheriff's hands, there to abide the decision of the case. From this judgment the garnishee alone appeals. He has no interest in the matter and claims none, and the judgment correctly maintains the seizure of the funds subject to the rights of parties concerned.

Savings Bank vs. Peuser, p. 796.

HARBOR MASTERS.

The legislation relative to harbor masters, has no applications to vessels entering the port of New Orleans, loading, unloading or making fast to private wharves on the right bank of the river, placed by law under the exclusive management and control of the owners thereof.

The duties imposed and rights conferred upon the harbor masters are not susceptible of being performed or exercised at the wharves of the company, to whom the exclusive management and control of the same has been entrusted by legitimate authority.

The failure to have ever set up claims for services and to have proved that such were rendered, tell significantly in favor of the company.

Harbor Masters vs. Railroad and Steamship Company, p. 124.

HOMESTEAD.

The action of a creditor to have a judgment recognizing a homestead in favor of his judgment debtor, declared inoperative and void, for the reason that the conditions which were the motive of the judgment, have ceased to exist, must not be confounded with the action for the nullity of a judgment as provided in Section 3, chapter 5, of the Code of Practice.

Such an action rests on the principle that if anything should happen to destroy the force of a judgment, it will cease to have effect either against the parties or their heirs.

The debtor who claims a homestead under Act 52 of 1865 must combine in him at least three conditions: he must own the property, he must occupy it as a residence, and he must have a family dependent upon him for support. A judgment declaring a property as his homestead on those conditions will cease to have effect as soon as the conditions or any one of them cease to exist.

HOMESTEAD—Continued.

On proper showing such a judgment will be declared inoperative and avoided.

As soon as the judgment becomes inoperative, the judicial mortgages which had been properly inscribed against the owner of the property recognized as his homestead, and which were dormant, become executory against the property even in the hands of a third possessor by virtue of a sale from the original owner.

The owner of a property exempt from seizure as his homestead cannot sell such property free of the mortgages inscribed against it before the sale. He has the legal right to sell the property, but it passes to the purchaser burdened with the judicial mortgages duly inscribed against the vendor.

Denis vs. Gayle et al., p. 287.

The homestead right cannot be contractually waived, renounced or destroyed otherwise than by sale or its equivalent, and, finding that in this case the defendant has not sold or alienated his homestead, his claim for its protection must be sustained.

Colvin vs. Woodward, p. 627.

HUSBAND AND WIFE OR MARRIED WOMEN.

To bind the wife as a public merchant two things are essential—1. that the business be conducted in her name; and 2. that it be separate from that of her husband.

Where the business is conducted in a name which is neither that of husband or wife, and when the plaintiff, in his business correspondence, addressed his letters in such name with the prefix of *Monsieur*, he cannot claim that he supposed the name to designate the wife.

When the husband appears as the head of the business and mainly conducts it, when the licenses are taken out and the contracts executed in his name, and when he is regarded in the community as its head and master, no participation therein by the wife will make her liable. *Queyrouze vs. Capmartin and Husband*, p. 262.

All the property purchased by a wife duly separated in property from her husband, after the date of the judgment of separation, becomes her separate estate, to which the husband or his heirs at law can lay no claim.

Succession of Dejan, p. 437.

A husband who signs an act of sale of property to his wife containing the declaration that she purchases with her own separate paraphernal funds and for herself, is estopped from contesting this admission.

HUSBAND AND WIFE OR MARRIED WOMEN—Continued.

A wife is entitled to recover from her husband, in a suit for a settlement of the community, the proceeds of property belonging to her, used for purposes of the community.

Maguire vs. Maguire, p. 579.

A party who resides in this State with the intention of fixing here his domicile for an indefinite period of time and engages in active business pursuits for a number of years acquires a domicile in the place in which he has thus lived, which becomes the conjugal domicile, if, in the meantime, he contracts marriage even in a foreign country with a wife whom he brings to his residence and who lives here with him a number of years.

The wife who visits and sojourns in her native country and refuses to return to the domicile thus established is amenable to the courts of this State in an action for separation from bed and board by the husband for her alleged abandonment of the conjugal domicile.

Larquis vs. His Wife, p. 457.

A *dation en paiement* by a husband to his wife, whereby she assumes and agrees to pay debts of the husband to his vendors, is a contract not authorized but prohibited by law, and does not pass the property from the former to the latter.

A *dation en paiement* of property consisting of movables and of an interest in real estate, for one and the same price, is indivisible, and must stand or fall as an entirety; but this is not the case where two distinct valuations have been put on each class of property. *Glaze, wife, et al. vs. Duson, sheriff, et als.*, p. 692.

INJUNCTION.

The only question on this appeal is as to whether a cause of action is set forth against Glenny & Violet.

Considering the allegation of the petition that the principal defendant has sold or exchanged \$34,000,000 of stock certificates for \$10,000,000 or less of property; and considering that the sole allegation connecting G. & V. with the matter is the simple one that they are engaged in selling and dealing in these certificates, without any suggestion that they act as agents of the Trust, or enjoy any exclusive privilege not open to every other person.

Held: 1st. That no reason is set forth for enjoining G. & V. from selling, while leaving the rest of the world at liberty to do so; 2d. That whatever be the validity of the certificates as shares of stock, and whether or not they confer on the holders the privileges of corporate shareholders, they certainly represent an interest in the

INJUNCTION—Continued.

property for which they were taken, and have a value, and cannot be placed *hors de commerce* by an injunction.

State vs. American Cotton Oil Trust et al., p. 8.

Defendants were sued to deliver a list containing subscriptions of various parties to 800 shares of the stock of plaintiff corporation of the face value of \$50 *per share*, and in default of such delivery, for judgment condemning them to pay the value of said list.

Held, that the utmost consequence which the law could attach to defendants' default in non-delivery of the list could not exceed a personal obligation to discharge the liabilities of the subscribers in accordance with the terms of their subscriptions; and that a judgment condemning them to pay \$40,000 cash on such default, where the subscriptions were on terms of credit, and without recognizing or reserving their right to receive the stock subscribed for, is manifestly insupportable.

The foregoing robs the injunctive proceedings of all significance.

Peoples' Brewing Co. vs. Boebinger et als., p. 277.

INSOLVENCY.

An opposition to an insolvent's cession and discharge, grounded on a charge of fraud, is in the nature of an answer, and citation to the insolvent is unnecessary.

On the trial of such opposition, the insolvent is a competent witness in his own behalf.

If an insolvent debtor is shown to have committed any "kind of fraud to the prejudice of his creditors," whether it is specifically denounced in the statute or not, he may be proceeded against, and condemned, under R. S. §1803.

Sections of Revised Statutes, 1803 and 1804, relate to different classes of fraud; one provides for fraud *per se*, and the other for *presumptive* frauds.

While the insolvent law is a highly penal statute, it is not a criminal law, and the charge made against the plaintiff is not a criminal but a civil one. Hence, the court *a qua*, had jurisdiction.

Section 1805 of the Revised Statutes is a valid and constitutional law.

The penalty that is denounced by this statute is not imprisonment for debt; and the statute does not conflict with the act of 1840, which abolished the writ of *ca. sa.*

One State or Government, cannot in virtue of its criminal laws, punish acts committed against the laws of another State; but in a civil proceeding, like the instant one, proof of fraud or theft com-

INSOLVENCY—Continued.

mitted in another State by an insolvent debtor, will sustain a charge of fraud that is made against him in the courts of this State.

Additional and extraneous evidence, not offered on the original trial of the suit, cannot be introduced on the trial of an application, for a rehearing, unless it is based wholly or in part, on the ground of it being newly discovered testimony.

To support a charge of fraud under the insolvent law, it is unnecessary that the proof should show that the mass of creditors have been injured by the fraudulent acts of the insolvent debtor, whereby the amount of property applicable to their demands has been reduced. It will suffice, if the proof shows that the insolvent obtained goods under a false and fraudulent pretence from a single individual creditor. *Mayewski vs. His Creditors. p. 94.*

Any creditor may oppose the appointment of a syndic, or charge fraud against the insolvent debtor, by means of an opposition laid before the court within ten days next following the meeting of creditors.

The acceptance of an insolvent's surrender and the selection of a definitive syndic by a meeting of his creditors, cannot conclude judicial inquiry into the legality of the syndic's appointment or a charge of fraud against the insolvent.

At such a meeting of the creditors of the insolvent, their respective claims are certified on oath to be true and legitimate, and such certification of their claims entitles them to vote. This is an *ex parte* proceeding before a notary public possessed of no judicial powers, and cannot operate as an estoppel or *res judicata* in respect to subsequent judicial proceedings.

At such a meeting of creditors only two questions can be presented or determined—one is the acceptance of the insolvent's surrender and the other is the selection of a syndic.

Before any proceedings can be taken looking to the sale of the property of the insolvent, and the application of the proceeds to his debts, it is necessary that a syndic should have been qualified and an order of court for the sale obtained. As an incident of such proceedings, a meeting of creditors must be called for the purpose of determining the terms and conditions of sale.

Mortgaged and privileged creditors are not bound by the decision of the majority of other creditors, whether they desire the property effected with their liens to be sold for cash or on terms of credit in satisfaction thereof.

Privileges must be ascertained and settled contradictorily with all the creditors. Creditors cannot litigate their demands separately

INJUNCTION—Continued.

property for which they were taken, and have a value, and cannot be placed *hors de commerce* by an injunction.

State vs. American Cotton Oil Trust et al., p. 8.

Defendants were sued to deliver a list containing subscriptions of various parties to 800 shares of the stock of plaintiff corporation of the face value of \$50 *per share*, and in default of such delivery, for judgment condemning them to pay the value of said list.

Held, that the utmost consequence which the law could attach to defendants' default in non-delivery of the list could not exceed a personal obligation to discharge the liabilities of the subscribers in accordance with the terms of their subscriptions; and that a judgment condemning them to pay \$40,000 cash on such default, where the subscriptions were on terms of credit, and without recognizing or reserving their right to receive the stock subscribed for, is manifestly insupportable.

The foregoing robs the injunctian proceedings of all significance.

Peoples' Brewing Co. vs. Boebinger et als., p. 277.

INSOLVENCY.

An opposition to an insolvent's cession and discharge, grounded on a charge of fraud, is in the nature of an answer, and citation to the insolvent is unnecessary.

On the trial of such opposition, the insolvent is a competent witness in his own behalf.

If an insolvent debtor is shown to have committed any "kind of fraud to the prejudice of his creditors," whether it is specifically denounced in the statute or not, he may be proceeded against, and condemned, under R. S. §1803.

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INSOLVENCY—Continued.

against the syndic, or in an opposition to the appointment of a syndic. *Spears vs. His Creditors*, p. 650.

INSURANCE.

Where goods, whilst on the wharf of a steamship company, awaiting shipment on one of the vessels of the company, are burned, the owners of the goods cannot recover for their loss upon a policy of insurance, wherein the goods insured or to be insured are referred to (quoting): "as goods laden or to be laden on board the good ship——" when the policy contained the further expression (quoting:) "Beginning the adventure upon said goods and merchandise from and immediately following the loading thereof on board of said ship."

This last expression will control as to the time the risk began; the former may be regarded as descriptive of or as designating the stock of goods or merchandise intended to be insured.

Cottam & Co. vs. Insurance Company, p. 259.

In a suit on a marine insurance contract, predicated on an open marine policy, proved and admitted to have existed between the insured and the company, the burden is on the company to prove its contention that the open marine policy had been cancelled and rescinded before the date of the contract of insurance sued on.

Parol testimony is incompetent and inadmissible to vary, alter or modify the stipulations of a written contract of insurance, and, hence, it will not be admitted to support the contention of the insurer, that the insurance was for total loss only, if the instrument evidences a different agreement;

A sale at public auction, in accordance with the law of a seaport, at which a disabled vessel puts in after a storm or other distress, is the best mode of disposing of a cargo shown to be too seriously damaged for reshipment.

An insured cannot recover for a total loss in the absence of proof of abandonment and of notice of the same on the insurer.

Gomila & Co. vs. Insurance Company, p. 553.

INTERDICTION OR CURATOR.

A curator of an interdicted person cannot keep the funds of the interdict without accounting for the same to the probate court, under a claim that the interdict is indebted to him. He must account for the money received, and the indebtedness of the interdict, if it exist, must be settled and adjudicated under the supervision of the court. Nor can such curator transfer his claim to another person

INTERDICTION OR CURATOR—Continued.

and authorize such person to collect the money of the interdict and retain it in satisfaction of the debt so transferred, without proper judicial sanction.

McKenzie et als. vs. Bacon et als., p. 158.

JUDGMENT.

A judgment taxing cost is an interlocutory decree, though rendered after the judgment in the cause, and separately signed; but same cannot be revised or reviewed in case the evidence in support of it has not been reduced to writing, and is not in the record.

Whitney Iron Works Company vs. Reuss, p. 112.

In an action for the liquidation of a partnership, in which issue has been joined between the parties as to the sufficiency and correctness of an account furnished to the suing partner by the managing partner, in which a trial has taken place on evidence introduced on the merits of the controversy, and in which the defendant had not filed an exception or even prayed for the dismissal of the suit, a judgment maintaining an exception, and for those reasons dismissing the suit, is not responsive to the issues tendered by the pleadings, and such a judgment cannot be reviewed on the merits by the appellate tribunal.

In such a case the judgment will be set aside and the cause remanded for trial on the issues involved in the controversy.

Wood vs. Daboval, p. 256.

This Court is bound to take cognizance of its own decisions, and in cases so intimately associated that one is a necessary incident of the other, the decree in one should be so framed as to give effect to the decree in the other, and save litigants unnecessary cost and delay.

Hubbs, administrator, vs. Kaufman, executrix, p. 320.

Creditors whose claims arose subsequent to a judgment of separation of property between husband and wife, cannot contest the correctness or validity of such judgment, except, at least, for absolute nullities.

Want of publication of the judgment, unless shown to have been fraudulent or injurious, is not a ground of nullity which subsequent creditors can urge.

Where the judgment allows no money claim against the husband and only recognized the wife's title to a carriage and horses shown to have been her paraphernal property, no execution was necessary, and want of it is not a ground of nullity.

Brown & Learned vs. Smythe et als., p. 325.

JUDGMENT—*Continued.*

In an action *en declaration de simulation*, pure and simple, which is unaccompanied with an *alternative* prayer that if the act complained of is not found to be a fraudulent simulation, it be declared to have been one in *fraud* of creditors, and, as such, annulled, it is not in our power to render judgment annulling it on the latter ground.

Pochelu vs. Catonnet, p. 327.

A judgment is a *fiat* of a court, setting the rights of the parties, and however unjust, erroneous or illegal the settlement may be, the parties can only claim under it that which, by its terms, the judgment awards.

Hence, the holder of a judgment against the city of New Orleans, which allows him interest from April 27, 1887, and who seeks to have his judgment funded into bonds under Act 67 of 1884, cannot claim or be allowed bonds bearing interest from June 1, 1884. No more interest can be allowed than fixed by the judgment.

Schulhoefer vs. City of New Orleans, p. 512.

A previous judgment declaring the assessment under which such tax sale was made absolutely void, is not binding on the purchaser at such a sale if not a party to the suit in which the judgment was rendered.

State ex rel. Maspereau vs. Batt, register, et als., p. 582.

JUDICIAL SALES.

One who purchases at an execution sale the right, title and interest of the defendant in execution, acquires *only* such title as the latter had.

If amongst the property sold there is a lot, which the expropriated owner was possessed as a *lessee*, the adjudicatee would take as such, and be substituted as lessee in his place *pro tanto*.

School Directors vs. Edrington, p. 633.

Property adjudicated at a sheriff's sale for taxes to a mortgage creditor, and subsequently retroceded with the formal agreement that matters will stand in the condition in which they were previous to the adjudication, can be proceeded against *via executiva* by the creditor to foreclose the mortgage, as though the tax sale and retrocession had never taken place.

Such creditor has the right to surrender possession of the property given him to extinguish the debt, by application of the fruits, and to have the property seized and sold to pay his claim, when he has not expressly abandoned that right or bound himself to retain possession.

Beer et al. vs. Haas et als., p. 413.

JUDICIAL SALES—Continued.

Although a purchaser may be protected by the order of a court directing a sale in a matter over which it has jurisdiction, yet he has the right to inquire into the validity of the proceedings and conducive to the order of sale, to ascertain whether, under the showing made, the court had the power to make the order.

His refusal to comply with the adjudication may be justified whenever the order of sale and the proceedings instituted to procure it are on the face of the papers unwarranted by law.

Succession of Dumestre, p. 572.

JURISDICTION.

The Supreme Court has no jurisdiction over tax suits regardless of the amounts involved unless the legality or constitutionality of the tax be in contestation.

In a case where the party resists the payment of a tax, on the grounds of payment, of illegality in the assessment, or of the mode of levying the tax and of other irregularities involving the validity of the tax, the amount of the tax claimed, and not the value of the property seized therefor, is the matter in dispute.

In such cases, if the amount of the tax does not exceed \$2,000, the Supreme Court has no jurisdiction.

Johnson vs. Cavanac, tax collector, p. 773.

If the succession funds shown by the account for distribution exceed \$2,000, this Court has jurisdiction, whatever be the amount claimed by the opponent.

Succession of Cassidy, p. 827.

A rule to tax costs, and judgment thereon, are interlocutory, and form parts of the original proceedings.

It is a general rule that the sovereign cannot be sued in his own court without his consent; and hence no direct judgment can be rendered against him therein for costs, except in the manner, and on the conditions, he has prescribed.

When a State submits itself to the jurisdiction of a court in a particular case, either by the institution of suit or permitting itself to be sued, that jurisdiction may be used to give full effect to what the State has, by its act of submission, allowed to be done.

But it is the duty of the courts of the State to carefully examine the acts of submission, and determine the extent to which jurisdiction extends, and render judgment accordingly.

Neither the constitution nor the law governing such a proceeding as this confers jurisdiction on this court to render a direct judgment against the State for the costs of taking testimony therein, in any event.

State ex rel. Attorney General vs. Lazarus, p. 856.

JURISDICTION—*Continued.*

It is the settled jurisprudence that this Court is without jurisdiction in revocatory actions which seek to subject property that has been fraudulently conveyed to the payment of debts less than \$2000 in amount. *Pochelu vs. Catonnet*, p. 327.

A party who has acquiesced in a judgment of the Supreme Court, which has acquired the force of *res judicata*, dismissing for want of jurisdiction an appeal in a case in which he was a party and virtually deciding that the matter in dispute comes within the exclusive jurisdiction of the Court of Appeals, cannot be permitted to question the exercise of that jurisdiction by the latter court, the less so, where he has formally submitted himself to it.

A prohibition in such a case does not lie.

State ex rel. Singer vs. Sheriff et al., p. 378.

Under the law in force antecedent to the adoption of the present Constitution, courts of probate had jurisdiction of actions for the partition and settlement of community rights and property and in which the heirs and legal representatives of a deceased spouse seek to ascertain, establish and recover a share in the active mass of the community.

The Second District Court of the Parish of Orleans, as it existed at that time, was vested, with exclusive jurisdiction of *probate matters*, and consequently of suits for the partition of community property in *liquidation* and not in possession of major heirs, as the co-proprietors thereof. *Lery vs. Hitsche*, p. 500.

A District Court has no jurisdiction over a cause, the object of which is to have it determined that claims, to enforce which suits are apprehended to be brought before a city court in unappealable amounts, have been paid or settled.

As a corollary, such court has no right to issue an injunction to prevent the creditor from instituting such suits.

It will be time enough to urge the plea of payment when the claims are put in suit. It is not to be presumed that if the same is established, the city judge will not maintain it or will violate the law and his official oath. 39 Ann. 619 affirmed.

While under Article 90 of the Constitution this court would be impotent to overturn an illegal judgment overruling the defense of payment, it could, under proper charges and proof, afford adequate relief under Article 200 of the same Constitution.

State ex rel. Sweeney vs. Judge et als., p. 1.

JURISDICTION—Continued.

The objection that the supervisory powers of this Court cannot be exercised in appealable cases, is obsolete and has become a legal nuisance.

State ex rel. Henderson vs. McGrea, Justice of the Peace, p. 20.

Where a fund exceeding \$2,000 realized by the sale of mortgaged property, is in the hands of the sheriff, and the whole fund is claimed by the seizing creditor and \$1000 of said fund is claimed by a third opponent in preference to said creditor, this Court has jurisdiction of the case.

The controversy involves the distribution of the entire fund.

Weil—Mechanics and Traders' Insurance Co. vs. Levi et als., p. 135.

Section 1 of Act 5 of the Extra Session of the Legislature of 1870 deprives the courts of this State of jurisdiction or authority to grant a writ of peremptory mandamus against the Comptroller or Treasurer of the city of New Orleans, the object of which is to enforce the payment of money claimed of the said city.

State ex rel. Barber Asphalt Paving Co. vs. New Orleans et als., p. 299.

A cause in which the original demand exceeded two thousand dollars, but which, by amended pleadings, finally involves an amount not exceeding two thousand dollars, is not appealable to the Supreme Court.

Hence, such an appeal cannot be sustained.

Martine and Husband vs. Hopkins, p. 322.

JUSTICE OF THE PEACE.

It is only where a judgment has been rendered by a justice of the peace in the presence of the parties that notification of it can be dispensed with.

It is only when thus rendered, or after notice thereof has been given, that the delay to make the judgment final begins to run.

Act 24 of 1876, which amends Article C. P. 575, so as to dispense with notice of judgment where answer was filed or citation was served personally, applies to district courts and not to justices.

A justice of the peace has no authority, where the plaintiff does not appear on the day of trial, to hear evidence by the defendant, in the absence of a reconventional demand, or the like, to pass upon the merits of the cause and render a judgment for the defendant and against the plaintiff, condemning the latter to pay a specified amount as costs.

The only judgment which he could have rendered was one of *non suit*. In acting otherwise he has exceeded the bounds of his jurisdiction.

JUSTICE OF THE PEACE—Continued.

Under the showing, the judgment rendered and complained of is irregular, and the execution issued under it is unwarranted.

Relator is entitled to relief.

State ex rel. Henderson vs. McCrea, justice, p. 20.

LAND LAW.

A patent granted by the United States under Sec. 2447, U. S. Revised Statutes, operates only as a quit-claim or relinquishment of any claim on the part of the United States to the land, and is without prejudice to adverse claimants.

When it concerns land which had passed into private ownership under Spanish grants, antedating the cession to the United States, and subsequently confirmed by acts of Congress, such land will be considered as having been fully severed from the public domain, from the date of such confirmation, and fully subject to prescriptive titles.

Finding that defendants have established all the elements essential to maintain their plea of prescription, it must be sustained.

Louis et al. vs. Giroir et als., p. 710.

LAWS.

After the intent and meaning of the law has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the law as the text itself, and a change in the construction is the same in effect on contracts as an amendment of the law, by means of a legislative enactment.

Levy vs. Hitsche, p. 500.

LEASE.

A lessee is not responsible for losses that are occasioned by fire, without his fault and neglect.

Although a purchaser who buys, without qualification, an unexpired lease, assumes the obligations of the lessee, yet he is relievable therefrom if he should be deprived by the lessor of the enjoyment of the lease.

Schwartz vs. Saiter, p. 264.

LICENSES.

Act 136 of 1880 does not repeal Act No. 90 of 1877, which is a *special* statute relative to the bringing of suits by the city of New Orleans, before justices of the peace, for the collection of licenses, and to the tax to be paid by the city on instituting such suits.

Act 136 of 1880 is a *general* statute, which fixes taxes to be paid in the shape of stamps, in all suits brought before district and city courts in New Orleans and which is not incompatible with the Act of 1877. Both can be reconciled and stand together.

LICENSES—Continued.

Stamps for \$1.50 on a license for \$50 by the city is sufficient, and the city judge should issue process.

State ex rel. Cain et al. vs. Judge, p. 844.

LIQUIDATORS.

The appointment of a liquidator is one of those matters that must be left, in a great measure, to the sound discretion of the court.

McNair vs. Gourrier, executrix, p. 353.

When an insolvent State or banking institution is administered by three liquidators, whose commissions are fixed by law, they will not, in addition to such commissions, be authorized to charge a salary for their services. Nor will they be entitled to the assistance of clerks, unless they first show that from the intricacy of accounts, or other cause, the services of the clerks were a necessity, and obtain the authority of the court for their employment, when they have already the help of two experts in the work of liquidation.

In the matter of the Louisiana Savings Bank and Safe Deposit Co., in Liquidation, p. 514.

MANDATE.

Powers of attorney to sell and transfer the property pledged, given by the pledgor to the pledgee, as an adjunct to the contract of pledge itself, are not revoked by the insolvency of the pledgee or other causes stated in C. C. Art. 3027.

The Art. 3027 is derived from the Code Napoleon and expresses a general principle of universal jurisprudence on the law of mandate, and the construction has been uniform under all systems that it did not apply to powers coupled with an interest in which the mandatory was made a *procurator in rem suam*.

The amendment of the article by Act No. 13 of 1882 is considered and construed as not inconsistent with the foregoing principles or preventing their continued application.

Renshaw vs. His Creditors, p. 37.

MANDAMUS.

Mandamus lies to compel a district judge to grant an injunction *in limine* to any purchaser whose property is seized for the payment of the price of a thing sold to him, whenever suit has been instituted against him, for the recovery of the property; the more so when, from the showing made, it appears that a judgment of eviction was rendered contradictorily with the seizing creditor in favor of the plaintiff in revindication; that the judgment has been executed, and the debt has been partially extinguished.

MANDAMUS—*Continued.*

In passing upon cases of this class, the court does not propose, in the least, to trench upon the merits of the controversy, as it acts merely on the face of the papers, and *as, during* the trial, facts may be established and a standpoint taken which would justify adverse conclusions. *State ex rel. Jacobs vs. Judge, p. 206.*

Act 100 of 1886 directs the performance of certain duties by the *City Council alone*, and imposes on the Comptroller and Treasurer the performance of none. Its provisions do not appertain to the executive department of the city government, but same are exclusively confirmed to the legislative department thereof.

Mandamus does not lie for the enforcement of that act.

Former opinion did not hold that Act No. 5 of 1870 barred the writ of mandamus as a remedy to enforce performance of specific duties imposed by subsequent legislation on the city of New Orleans, its Council, or any of its officers; but that the law invoked by relator did not impose the specific duties for the performance of which the mandamus was asked.

Held: the word "revenues," as used in act 109 of 1886, necessarily means the budget estimate of revenues, because otherwise it would be a mathematical impossibility to frame the budget in accordance with the requirements of the city charter.

State ex rel. Paving Company vs. City of New Orleans et als., p. 299.

It is irregular to proceed by *rule* to compel a legal organization to perform a duty, however clearly imposed upon it.

The objection that such proceeding is unauthorized, and ought to be by *mandamus*, is well founded and cannot be disregarded.

Oliver vs. Board of Liquidation, p. 321.

Mandamus will not go to the Board of Commissioners after the levy of the tax has been completed, the tax has been extended on the assessment roll, and the roll placed in the possession of the tax collector for collection, because it would be nugatory for want of power in such board to make the correction that is required, it being *functus officio*.

Gaither vs. Green, tax collector, et al., p. 362.

A mandamus will not lie to compel the Register of Conveyances of the parish of Orleans to erase from the record of his office a tax deed, in the absence of a final judgment of a competent court declaring the nullity of the tax sale, not even if the purchaser at such tax sale is made party to the proceeding.

State ex rel. Maspereau vs. Batt, register, et al., p. 582.

MANDAMUS—Continued.

Mandamus does not lie to compel a suspensive appeal from an order *in limine*, granting an injunction, unless after exhaustion of adequate means to dissolve and the act enjoined, if committed, would cause irreparable injury.

State ex rel. Shakspeare, mayor, et al. vs. Judge, etc., p. 607.

A mandamus does not lie against a district judge to direct him to annul such appointment and to cancel the letters issued to the provisional syndic, when, for reasons assigned, the judge has declined to do so.

The exercise of a legal discretion cannot be controlled by mandamus.

State ex rel. Levy & Son vs. Judge, p. 818.

Determining whether relator is or not entitled to a peremptory mandamus compelling the respondent judge to grant him a writ of injunction, depends upon whether the law entitles him to it, *as of right*. If the law gives the respondent the discretion to grant or refuse it, the mandamus will not go.

In a mandamus proceeding we are not to inquire whether, in dissolving the writ, the respondent exercised a sound and legal discretion, but to simply ascertain whether he had *any discretion at all*.

State ex rel. Johnson vs. Judge, p. 852.

MARRIAGE AND DIVORCE.

A married woman, whose husband has left her, and has disappeared, and after several years is reported dead, and who believes that her said husband is dead, will be held to have been in good faith in contracting a second marriage, although such marriage was subsequently declared judicially to have been null, for reason of her want of legal capacity to contract matrimony.

McOaffrey vs. Benson, p. 10.

Where a marriage is solemnized in France, and the husband subsequently abandons his wife and comes to Louisiana, he cannot prosecute a suit against his abandoned wife for a divorce in a contr in this State by causing a *curator ad hoc* to be appointed to represent her, through whom she is cited, and the wife is not notified of the proceedings and the judgment of divorce rendered in the suit will be regarded as rendered without citation and such judgment will be an absolute nullity.

Champon vs. Champon, Her Husband, p. 28.

MINORS AND THEIR TUTORSHIP.

Property belonging exclusively to minors can be ordered to be sold only on compliance with the requirements of the law on the subject.

MINORS AND THEIR TUTORSHIP—Continued.

An order of sale of the entire property of a succession, inherited by minor and major heirs, to pay the debts and to settle the claims and interest of the latter, can be assimilated neither to a sale asked by an administrator, nor to one to effect a partition, nor to one of minor's property.

No more can a tutor administering a succession than an administrator ask and obtain the sale of more property than is necessary to pay the debts.

A tutor can undertake the settlement of a succession only when it accrues exclusively to his wards.

Succession of Dumestre, p. 572.

MORTGAGE.

A note secured by mortgage, issued by a planter to the order of his merchant to make good all advances for the working of a plantation, although received as "*collateral security*," may be sued on, directly by the latter, for the exact amount of the advances,—as a pledger could do.

In absence of proof of want of consideration, and in the presence of evidence showing that the advances have been made, payment of the note may be enforced by the seizure and sale of the mortgaged property.

Chaffe & Sons vs. Whitfield, p. 631.

The right of a mortgage creditor is lost by the failure to reinscribe within ten years, although previous to the expiration of that delay the mortgage had died.

But no reinscription is necessary when the mortgaged property is sold within the ten years.

Payment of a judgment not reinscribed and not revived cannot be sought after the expiration of the ten years by which it is prescribed.

Succession of Gagneux, p. 701.

When a plantation owned jointly by a number of persons is mortgaged to secure a debt which they (the mortgagors) alone owe, and the owner of the outstanding interest in the property, not bound for the debt, convey that interest to the mortgagors, his co-proprietors, and waives in favor of their creditor his privilege and mortgage, upon the sale of the plantation to pay the mortgage debt, the creditor, after the full satisfaction of his debt, cannot apply the balance of the price at which the property is adjudicated to the payment of a subsequent mortgage in his favor. He cannot encroach upon the mortgage and vendors privilege of this co-proprietor beyond what is required to pay the mortgage debt, for the benefit of which the waiver was made.

Reggio vs. McCan, p. 479.

MORTGAGE—Continued.

In an action to cancel and annul a mortgage on allegations of fraudulent simulation, where the holder of the mortgage notes has actually reduced them by indorsement thereon, before suit to the amount actually due and correctly admits such reduction in his answer to the suit, and where the reality and good faith of his mortgage to the full extent claimed by him are clearly established, the mere failure to have erased the record in the mortgage office to the extent of the reduction, cannot support a judgment against him throwing on him the costs of a suit, every issue in which has been decided in his favor. The proceeding was not one to erase or reduce an inscription, but to declare the simulation and nullity of the mortgage itself.

Mutual National Bank of New Orleans vs. Regan et al., p. 17.

In case a junior mortgagee, for a consideration that is satisfactory to himself, intervenes in a subsequent act of mortgage in favor of a senior mortgagee to secure plantation advances to the mortgagor, and postpones thereto the rank and priority of his own, has no ground of complaint if the proceeds of the crop to which the advances were made, are applied to its discharge, even though the advances were not necessary plantation supplies, there being no clause in the act of making such a limitation.

Such a clause being incorporated in the *proces verbal* of the deliberations of a family meeting, recommending the postponement—the intervenor being an interdict—will not be considered as a restriction on the contract of mortgage in the absence of other provisions on the subject therein contained.

The phrase “that said sum of \$20,000 shall be exclusively used for the cultivation of the crop,” indicates that a duty was imposed on the mortgagor who borrowed the money, and not on the lender, who could not control its use or destination.

Lehman, Abraham & Co. vs. Godberry, Jr., p. 219.

The owner of a property exempt from seizure as his homestead, cannot sell such property free of the mortgages inscribed against it before the sale. He has the legal right to sell the property but it passes to the purchaser burdened with the judicial mortgage inscribed against the vendor.

Denis vs. Gayle et als., p. 286.

In a contract relating to real estate situated in this State between parties residing in a State where the common law prevails, it is stipulated substantially that one of the parties sells to the other the immovable for a designated price, and, further, that the said

MORTGAGE—Continued.

sum mentioned as the price was a debt owing to the alleged purchaser by the vendor, and that should said debt be paid by a time stated the act or conveyance should be void. The act was termed by the parties "a deed of mortgage," and was recorded in the mortgage record book of the parish where the property was situated. *Held*, that the instrument was a common law mortgage and did not have the effect of passing title to the property.

Howe, executor, vs. Austin et als., p. 323.

MUNICIPAL CORPORATIONS.

An annual charge of \$5 per pole upon the poles of a telephone company already established imposed by a municipal ordinance as "a consideration for the privilege" is not a tax either on property or as a license and cannot be sustained as an exercise of the tax-power.

It is not an exercise of the police power, as it involves no consideration of public order, health, morals or convenience.

A municipal ordinance granting to a particular company, authority to construct and maintain telephone lines on the streets, without any limitation as to time and for consideration stipulated, when accepted and acted on by the grantee by a compliance with all its conditions and the construction of a valuable and expensive plant, acquires thereby the features of a contract which the city cannot thereafter abolish or alter in its essential terms without the consent of the grantee; and the imposition of new and burdensome considerations is a violation thereof.

A proviso in the ordinance to the effect that "the acts and doings of the company under this ordinance shall be subject to any ordinance or ordinances that may be hereafter passed by the city," does not convert the grant into a more revocable permit. On the contrary, it assumes that the ordinance is to continue in full force and effect, and recognizes the right of the grantee to do and to act under and in accordance with it, and only subjects such "acts and doings" to future municipal regulations not inconsistent with the ordinance itself.

City of New Orleans vs. Telephone and Telegraph Co., p. 41.

Persons who deal with political or municipal corporations possessed of limited power to contract debts, must rely for their payment upon the annual revenues provided for them by law, in the absence of any special statute authorizing the creation of a contract therefor.

State ex rel. Wood vs. Board of Liquidation, p. 398.

MUNICIPAL CORPORATIONS—Continued.

That feature of the contract between the city and the New Orleans and Carrollton Railroad Company, which exacts from the public a fare of ten cents from Carrollton to Canal street, except from actual residents above Napoleon avenue, who can on certain conditions **make the trip for five cents, is not subject to attack as an unreasonable discrimination prohibited by the law governing the obligations of common carriers.** *Forman vs. Railroad Co., p. 446.*

NEGOTIABLE PAPER.

The transferee of a negotiable instrument, such as a promissory note made payable to the order of the maker and by him endorsed in blank, holds the instrument clothed with the presumption that it was negotiable for value in the usual course of business, before maturity and without notice of any equities between the prior parties to the instrument. That presumption is not rebutted by proof that the notes had been negotiated by an agent of the maker, contrary to the latter's instructions, who had left them in the possession of the agent for future negotiation according to special instructions to be given, and which were never given, without proof that such circumstances were made known to the transferee at the time, or in default of evidence tending to show that the transferee was not in good faith.

Cochrane vs. Dickenson, p. 127.

The right of action of an accommodation acceptor of a draft, and who pays or retires the same with his own means against the drawer, is for reimbursement, and it rests on the implied or conventional promise of the drawer to indemnify him.

By such a transaction the drafts have no longer any value as such, and the drawer is entirely discharged of all obligations thereon, his liability being to the acceptor for indemnity, and the draft being an item of evidence.

The fact that a member of a commercial firm in whose name negotiable paper has been issued by the managing partner, is ignorant of the transaction, and that no entry of the same has been made in the partnership books, will not release him from liability if it is in proof that the transaction had been made for and had enured to the benefit of the firm.

The acceptor who has paid such draft can recover only legal interest on the promise of indemnity.

Martin vs. Muncy & Marcy, p. 190.

Payment of a note by an endorser, actually bound, produces the legal effect of subrogating him to the rights of the last holder.

NEGOTIABLE PAPER—*Continued.*

Money borrowed, for account of the borrower and applied to the payment of a note, at the request of the drawer, cannot be claimed by the indorser as being *his* money, though he subsequently issued his check to the original lender, in the absence of proof that the money was lent to *him*, the indorser.

Seizas, syndic, vs. Gonsoulin et al., p. 351.

NEW TRIAL.

A defendant is always in time to apply for a new trial where the judgment was not rendered in his presence and where he was not notified of its rendition.

A justice of the peace, like all other magistrates, has the right to grant a new trial, either on motion of the aggrieved party, or *proprio motu*, where he considers his previous finding erroneous.

A justice of the peace has the right to assign a case for trial on giving the parties notice and sufficient time to summon their witnesses.

State ex rel. Henderson vs. McOrea, justice, p. 20.

OBLIGATIONS.

Every obligation is the correlative of a corresponding right, and when the right is destroyed the obligation is equally extinguished.

The modes of extinguishing obligations mentioned in C. C. 2130, embrace only those general ones applicable to all obligations, and are not exclusive of a multitude of other particular causes of extinguishment applicable to each peculiar kind of obligation.

The subsequent reacquisition of the notes by the vendor does not operate to revive this obligation which had been thus extinguished.

Peoples' Bank vs. Cage et als., p. 138.

PARTITION.

Real estate which cannot be conveniently divided in kind must be sold to effect a partition thereof.

Cazes vs. Succession of Cassie et als., p. 360.

A judgment to operate a partition by sale can be validly rendered only on proof that the property cannot be conveniently divided in kind.

A court having probate jurisdiction has no power to order the sale of *all* the property of a succession, inherited by minor and major heirs, at the instance of the tutor, with the consent of the latter, to pay debts which hardly amount to two-fifths of the estimated value of the property and to settle the interest of the major heirs.

Enough property must first be sold to pay the debts, and the residue accruing to such heirs may *then* form the object of a partition, in kind, or by sale, on proper proceedings and proof.

PARTITION—Continued.

In such case a court cannot decree the partition by sale, unless, on proof, that the property cannot be conveniently divided in kind.

Succession of Dumestre, p. 572.

PARTNERSHIP.

Where only a partial settlement of a partnership has been effected and where certain matters have been expressly reserved for future settlement and adjustment, an action will properly lie for a further and complete settlement.

Thompson vs. Walker, testamentary executor, p. 676.

PEACE BOND.

A threat to burn a dwelling-house is a threatened breach of the peace, as it puts the party threatened in fear, and excites him to personal prowess to protect his person and property.

A magistrate has the power under Sec. 1016 R. S., to order the party making the threats to furnish security that he will not carry out the threat, and in default of furnishing security he has the power under said section to commit until the security ordered is furnished.

State ex rel. Gestner vs. Recorder, p. 855.

PETITORY ACTION.

In a petitory action, exceptions filed by a defendant, the allegations of which, to be sustained, require the introduction of evidence of title upon which the exceptor must rely to maintain himself in the possession and ownership of the property, should be referred to the merits.

A party in possession of immovable property by an apparent judicial title cannot force the plaintiff to a trial on an exception that he must first bring a separate and distinct action to annul the judicial proceeding under which defendant relies for title.

Such a proceeding affords the defendant alone an opportunity to offer his evidence of title.

McOall vs. Irion et al., p. 690.

PLEADINGS.

A defendant who files a special plea is to be judged on that plea and none other. All else is admitted.

Hence a surety who denies his signature to a bail bond, which is an act under private signature, on a proceeding to forfeit the same, the accused not appearing when called is barred from all other defences, the signature once proved.

The principle applies whether the proceeding, which is intrinsically civil, be considered as civil or criminal in form.

PLEADINGS—*Continued.*

The consent of an accused, when arrested to correct a misnomer in the affidavit and in the warrant, will debar his surety on an appearance bond of the right of urging that the name of the principal in the bond is different from the name in the affidavit.

State vs. Hendricks and Jameson, surety, p. 719.

Payments made by syndics, liquidators and other fiduciaries, under *ex parte* orders of a court, are still open to inquiry as to their correctness. The practice of granting such orders without notice to those interested and without proof contradictorily made is, as a general rule, irregular and unwarranted.

But though unauthorized, such orders may be regarded as confirmatory of the good faith and honesty of those making the payments. And when the charges made are not extravagant on their face, and were for services of experts, attorneys and others, rendered under the eye of the court, and some of whom were appointed by the court without opposition, and the conduct and administration of the fiduciaries is free from suspicion of fraud, the payment will be viewed as *prima facie* correct, and in the absence of sufficient evidence to negative or rebut such presumption, the payments will not be rejected.

Louisiana Savings Bank and Safe Deposit Co., in Liquidation, p. 514.

Proceedings for the distribution of funds in the hands of a sheriff and arising from a sale, partake of the nature of a *concurso* and resemble a *tableau* of distribution.

In such cases, particularly when there exists a clash of interests, it is indispensable that all the claims affecting the proceeds in hand be considered together, and determined one and the same judgment, and not piecemeal or separately.

This is essential, to avoid confusion and injustice.

In the instant case, as two out of several claims have been passed upon separately, and those having an interest to resist them were not made parties, this Court is powerless to review the judgments complained of.

Citizens Bank vs. Tureaud et als., p. 149.

When, after the evidence in a case is closed and the argument begun, one of the parties discovers new evidence, the effect of which is to furnish a new ground of defense and presents an affidavit of its new discovery and of due diligence, and when it is apparent that it would furnish ground for a new trial, the discretion of the judge in opening the case and permitting a supplemental answer and offering of the evidence under it will not be interfered with.

State vs. Powell et als., p. 241.

PLEADINGS—Continued.

In a suit in which the plaintiff makes claim for a definite sum invested as her share of the capital stock of a partnership, and also for another and indefinite sum as her share of the net profits thereof on final liquidation and settlement, a motion to compel her to elect will not prevail. *McNair vs. Gourrier, executrix, etc., p. 353.*

An appellee who has not filed a timely motion or prayer for an amendment of the judgment appealed from can obtain no relief on appeal. *Sarpy et al. vs. Hymel et al., p. 425.*

When a party, about to be sued, is presented by his adversary with a petition addressed to a particular court, and endorses thereon his acceptance of service, waiver of citation and confession of judgment, and when, two days afterward, said petition and confession are filed in court and judgment rendered thereon, defendant cannot claim that such judgment is a nullity, because violating Art. 162, C. P., prohibiting election of a domicile (other than his own) for the purpose of being sued.

The confession of judgment was a pleading to the merits, and being filed with his authorization, its effect is to be governed by the date of filing and not by the date of its preparation.

Having thus pleaded to the merits, without exception to the jurisdiction, the judgment rendered is valid.

Kelly vs. Lyons, p. 498.

PLEDGE.

The mere fact that a creditor holds collateral securities does not prevent the principal debt from becoming due, nor debar the creditor from pursuing legal remedies for its enforcements. The pledge might be insufficient or invalid. The rights of defendant or of others interested to require surrender or application of the original securities are not involved in this appeal by a garnishee who has neither right nor interest.

Germania Savings Bank vs. Peuser, p. 796.

The right of retaining possession of the thing pledged until payment of his debt, conferred on the pledgee by Art. 3164 C. C. is an essential constituent of the *jus pignoris* and not affected by the cession of the pledgor. The syndic may, on proper showing or proper proceeding, compel the liquidation of the pledge by sale so as to ascertain any possible *residuum* applicable to other creditors; but he does not acquire the right to demand the surrender of the pledged property into his official control and administration and subject to the costs and charges thereof.

Renshaw vs. His Creditors, p. 37.

PLEDGE—Continued.

The action against defendant, Letorey, is not sustained by the evidence, so far as it charges simulation, and, as a recovatory action, is barred by the prescription of one year.

A pledge of shares of stock in corporations is validly effected by the delivery of the certificates, without the necessity of notice to the corporation or transfer on its books.

The case is not effected by the fact that the certificates refer to the charter, which contains a provision that no sale or transfer shall be made without first giving the corporation sixty day's notice, with the privilege to it or its members to purchase on equal terms.

Such provision obviously refers to transfers of ownership, and not to pledges. It will be time enough to discuss its effect and the rights of the corporation under it, when the pledgee shall seek to sell the stock in satisfaction of his pledge.

Crescent City Seltz and Mineral Water Manf. Co. vs Letorey, p. 155.

POLICE POWER.

The police power is the right of a State, or of a State functionary, acting under delegated authority, to prescribe regulations for the good order, peace, protection, convenience and comfort of the community, without encroaching on the like power vested in Congress by the Federal Constitution. It is known when and where it begins, but not when and where it terminates. Under it, a man's property may be taken from him, his liberty may be shackled, his person and life imperilled, in cases of great public exigencies.

New Orleans Gas Light Company vs. Hart, p. 474.

PRESCRIPTION.

Husbands and wives cannot prescribe against each other.

Succession of Vollmer, p. 593.

Prescription *acquirendi causa* cannot be acquired under a title resulting from a lease.

Parish Board of School Directors vs. Edrington, p. 633.

A submission to arbitration of the matter, embraced in a subsequent litigation, and a suit in affirmance of the award, praying that it be made executory, constitute a legal interruption of prescription.

Meyer vs. Ludeling, p. 640.

Although prescription be suspended against the creditors of an insolvent, the principle is inapplicable to successions, whether solvent or insolvent.

Succession of Gagneux, p. 701.

PRESCRIPTION—Continued.

The five years' prescription fixed by the terms of R. C. C. 3543, cures "all informalities connected with or growing out of any public sale made * * * at public auction," and is a bar, perfect and complete, in respect to "minors, married women and interdicted persons." *Linman et al. vs. Riggins*, p. 761.

Suit for reimbursement of taxes paid is a personal action only, prescribed by ten years. *Sandidge vs. Hunt*, p. 766.

Good faith and possession are not sufficient to acquire immovable property by the prescription of ten years.

A title sufficient in form to transfer immovable property is required as the basis of prescription. *Beer et al. vs. Leonard*, p. 845.

The evidence in the case fails to establish the claim with that certainty required to support a judgment.

When a co-owner of indivision of immovable property brings an action in his own name for the entire damage done to the estate by a trespasser, the citation in such suit will avail to interrupt prescription as to the other co-owner who afterwards intervenes and joins in the action. The suit was necessarily for his benefit, entitling him to an account from the plaintiff in case of recovery, and it informed defendant of the entire cause and object of the claim and of the titles on which it was founded.

Becnel vs. Waguespack, p. 109.

Prescription by which tax sales may be validated, or which debar from action to avoid such sales, does not run against incapacitated persons. *Kearns vs. Collins*, p. 453.

PRIVATE MARKETS.

The words of a law are generally to be understood in their most usual signification.

When, in Act No. 100 of 1878, prohibiting the keeping of private markets within a *radius of six squares* of a public market, in New Orleans, the Legislature used that language, they had in view to fix an equal and uniform distance in order to avoid any arbitrary discrimination, and intended that the distance should embrace, both, the length of the squares and the width of the streets; in other words, 2100 and not 1800 feet, American measure, as contended by the defence.

The 3100 feet are to be computed from any point on the public market limits nearer the private market.

State vs. Berard, p. 172.

PRIVILEGE.

Sections 128 and 2897 of the Revised Statutes confer no privilege upon real estate in favor of attorneys at law for their professional fees in obtaining judgment maintaining the title and possession of defendants in a petitory action.

The moment such a judgment becomes final its object is attained, and nothing remains to which a privilege could attach.

Mechanics and Traders' Insurance Co. vs. Levi et al., p. 135.

A contractor's privilege attaches to constructions and works erected on soil that is dedicated to public use.

The contractor's privilege attaches to constructions and works that have been erected on the leased premises, under a contract with a lessee, in the place of others that have been destroyed by fire during the term of the lease, without his fault or neglect.

Schwartz vs. Saiter, p. 264.

Advances clearly proved to have been used for other than plantation purposes, cannot be allowed a privilege.

For services rendered by counsel in the settlement of a succession in which there was little or no litigation, the assets realizing some \$6,000, an allowance of \$300 is ample, and will not be increased.

A vendor of real estate is entitled to a privilege for the payment of the unpaid price which exists until it has been relinquished, or the debt satisfied, or prescription has run.

The abandonment need not be in absolute terms. It is enough if it can be inferred from the acts of the parties that the vendor intended to waive his rank in favor of another and subordinate his claims, in order to secure payment of the latter by preference over himself. What surplus, if any, remains thereafter, accrues to the vendor.

Succession of Osborn, p. 615.

PROHIBITION.

An application for a prohibition, asked to issue to a court which is charged with usurpation of jurisdiction, or exceeding its powers will not be entertained unless an exception has been made to its jurisdiction and has been overruled.

State ex rel. Shakespeare, mayor, vs. Judge, etc., p. 607.

Prohibition lies to prevent the Court of Appeals from exercising jurisdiction over a controversy involving a right to a servitude of light and view, valued at more than \$1000 and a claim for \$1000 damages, together exceeding \$2000, the upper jurisdictional limit of said court.

State ex rel. Millard vs. Judges, p. 771.

PROHIBITION—Continued.

A prohibition cannot issue to a district judge to prevent him from doing an act which he denies to have done, which he refuses to do and which is not shown to have been done by him.

State ex rel. Levy & Son vs. Judge, p. 818.

Our supervisory power will be exercised only in cases where there has been a flagrant usurpation of authority, or when serious injury may occur to parties to whom no other remedies are afforded, or when the intermediate courts are without power to grant relief.

This Court will respect the independence of inferior courts in the determination of questions confided to their judicial discretion, and will not usurp merely appellate jurisdiction not conferred upon it by the Constitution.

If the case in which relief is sought be appealable, the relator has adequate remedy by appeal and is not entitled to the prohibitive authority of this Court.

A mere apprehension of injury is not, of itself, sufficient to justify the interference of this Court with the proceedings of inferior tribunals acting within the general scope of their powers.

State ex rel Mayer vs. Judge, p. 837.

PUBLIC OFFICERS.

The law confided the levy, assessment and collection of the special tax in question to three distinct and different sets of officials:

1. Its levy to the Board of Levee Commissioners.
2. Its extension on the parish assessment rolls to the parish assessors.
3. Its collection to the State tax collectors.

Once a tax is *in esse*, the tax roll placed in the hands of the tax collector, and the levying and assessing officers have become *functus officio*, the legality of such tax cannot be tested with the collector alone.

In case there be difficulty in interpreting the qualifying words of a sentence, the rule is to apply them to such *other* words or phrases as shall immediately precede them therein, rather than to those more remote.

Taxes levied under the authority of Act 33 of 1879, and not collected prior to the passage of Act 44 of 1886, were not abrogated thereby. They were preserved and kept in force after the passage of the latter, by virtue of the saving clause contained in Sec. 9 of said act.

Gaither vs. Green, tax collector, p. 362.

PUBLIC ROADS.

In the absence of clear proof of dedication to public use, or of formal assent by the owner, from which the same can be inferred, a road

PUBLIC ROADS—*Continued.*

used by the public by the tolerance of the latter for thirty years and even longer, will not be declared a public road.

Section 3668 R. S. which incorporate an act of 1818, defining what roads are public, should be construed with Article R. C. C. 455, which declares that the use of the banks of *navigable* rivers or streams is *public*.

In the instant case, the bayou on which it is claimed that the lands of the defendant front, is not a navigable stream and the road in question is not public, *McCearley vs. Lemennier*, p. 253.

REGISTRY.

Prior to the passage of the Act of the 3rd of April, 1853, notarial titles were not required to be filed and registered in the book of conveyances in the recorder's office.

The right of a proprietor of real property evidenced by the registry of a conveyance thereof in the proper book, and the proper office, in the parish in which it is situated at the time, is not affected by the incorporation of it into a new parish, and no additional registry in the new parish is necessary in order to preserve its effect. *Parish Board of School Directors vs. Edrington*, p. 633.

A money lender may safely deal, as far as the question of ostensible ownership goes, with one whose title to real estate property appears on the public records and cannot be affected by any anterior transfer of the property, unless the same was made by the ostensible owner, his authorized agent, or by judicial authority, and the transfer was patent by proper registry.

Such party cannot be charged with notice, unless the notice result from a valid registry of the transfer, and is not bound by judicial proceedings in which the title of the property is involved, but to which he was no party. Notice, as a rule, is not equivalent to registry. *Boyer vs. Joffrion, sheriff, et als.*, p. 657.

RES JUDICATA.

A judgment in a case in which a cause of action was not set forth, because it had then no existence, cannot constitute *res judicata*.

Pasley vs. McConnell, p. 609.

Where plaintiff has brought a hypothecary action against a third possessor for the recognition of his mortgage on property held by the latter, and for a decree that the property to be sold to satisfy the same, and has recovered contradictory judgment to that effect, which has become final, and has issued execution thereon, said judgment is *res judicata* as to all antecedent matters which he

RES JUDICATA—Continued.

urged, or might have urged, as defenses in said suit; and he cannot set them up again as grounds for an injunction against the execution of the judgment. *Ludeling vs. Chaffe, et al., p. 645.*

When the principal and sureties on an official bond are sued together, the judgment as to the principal is *res judicata* as to the sureties.

Easton and Breaur vs. Board of School Directors, p. 705.

REVIVAL OF JUDGMENT.

When a judgment of revival of a judgment against a bankrupt debtor has been rendered contradictorily with the assignee in bankruptcy who has been cited and has answered, such judgment cannot be treated by a third person as an absolute nullity and collaterally attacked without any action or prayer to annul it. The propriety of such a proceeding finds countenance in several decisions of this Court, and presents a grave question, which it is to be assumed was considered and passed upon by the judge who rendered the judgment. *Ludeling vs. Chaffe, et al., p. 645.*

SALE.

In case the vendor really and seriously contemplates and agrees to sell a tract of land at a price which is fixed and certain, and the vendor, while offering and proposing to buy the land, obtained also a transfer of a judgment upon the false assertion that it operates as a judicial mortgage on the land sold and in respect to which the vendor is really deceived, *Held*, that on appropriate allegations and proof, the transfer of the judgment may be annulled and the amount that has been realized thereon, recovered of the vendee. *Savoie et al. vs. Meyers et al., p. 677.*

An instrument of writing acknowledging the receipt of a specified sum as a part of the purchase price of a tract of land, the title to which is to be executed at a future date, and the terms of which are to be ascertained by reference to another instrument, is not a sale which transfers the ownership of the property, but is only a promise of sale, on the conditions imposed, and confers the right on the promisee to compel performance on the part of the promiser.

Thompson, agent, vs. Duson, sheriff, et al., p. 712.

The five years' prescription fixed by the terms of R. C. C. 3543, cures "all informalities connected with or growing out of any public sale * * * at public auction," and is a bar, perfect and complete, in respect to "minors, married women and interdicted persons." *Linman et al. vs. Riggins, p. 761.*

SALE—Continued.

A purchaser of immovable property cannot be judicially coerced to accept a doubtful title. *Beer et al., vs. Leonard, p. 845.*

Parol evidence is inadmissible between the contracting parties to an act of sale of an immovable to prove its simulation. This can only be done by a counter-letter in writing equivalent thereto. To constitute a counter-letter it is not necessary that it should be contemporaneous with the act attacked. It is sufficient to set aside the act if the writing offered against it, of whatever date, contains an admission that the alleged sale was a simulation.

Nor is the plaintiff in such action debarred by any stipulation in the act, or by the warranty contained therein, from proving the falsity of the act. *Anderson vs. Benham, p. 336.*

When the vendor transfers the notes for the price, for a valuable consideration, to a third person without endorsement and without recourse or warranty, his right and power to demand or receive payment of the price ceases to exist, and with it his right to demand a resolution of the sale in the event of non-payment, and the corresponding obligation of the buyer.

People's Bank vs. Cage, p. 138.

The failure of the adjudicatee, at a judicial sale, to pay the price, gives the vendor the right to demand the revocation of the sale, though the property may have passed from the possession of the adjudicatee.

An authentic act of sale is full proof against all parties thereto. In the absence of a charge of fraud or error, it cannot be contradicted by parol proof tending to show that the sale was not real, that the ostensible purchaser was but a person interposed, and that he had incurred no obligation to pay the price.

McKenzie et als. vs. Bacon et als., p. 158.

The transfer of a judgment does not bind the judgment debtor, unless it has been notified to him or it is clearly shown that he had knowledge of it.

The mere filing or placing the transfer among the papers of the suit and recording of it in the books of the parish recorder, are not equivalent to the notice required by law, which must bring home to the debtor knowledge of the fact.

A debtor who settles with his creditor previous to notification or knowledge of the transfer is discharged from the debt.

Johnson & Co. vs. Boice & Frellan, p. 273.

SALE—Continued.

An act, purporting on its face to be a sale *a réméré*, is not translatif of the ownership of the real estate to the purchaser, when it is shown that the parties did not intend that it should so operate.

Such sales, made for an inadequate consideration and unaccompanied by delivery, will be treated, without sufficient evidence to the reverse, as contracts, by which the thing nominally sold stands as security and nothing else.

Property admitted to be worth more than \$2,500 cannot be claimed to have been sold, even *a réméré*, when the price stipulated is \$460, or even \$1,000, and possession was not delivered.

The vileness of the price and the retention of possession establish that the contract was designed solely to subject the property as a security.

Such an innominate agreement is in the nature of a pignorative contract, by which a *quasi* hypothecary right is conferred. It is recognized by the jurisprudence of the State as a contract of security, and may be enforced, on a proper proceeding and showing, for specific performance.

This cannot be done in a suit which is strictly a pure and simple petitory action, involving nothing but rights of ownership.

Howe, executor, vs. Powell et als., p. 307.

A sale made to one not a creditor, for a price in cash, though inadequate to the value of the property conveyed, cannot be annulled at the instance of the creditors of the vendor, who was insolvent at the time, to the knowledge of the purchaser, on the charge of simulation.

A *dation en paiement*, made in consideration of a valid and subsisting indebtedness, cannot be revoked on the charge of simulation, if the conveyance was really intended to pass a title to the property to the creditor, and he really acknowledged full payment of the debt.

Pochelu vs. Catonnet, p. 327.

SEIZURE.

Where numerous suits have been instituted against a common debtor by a number of creditors, accompanied in some cases by attachments and in others by sequestrations, and the property seized under the writs has been sold by written consent of all parties, and the funds are in the hands of the sheriff, the debtor cannot be permitted to release the seizures and take the funds in his possession upon executing his bond (one bond) wherein the agreement for the sale signed by him it is expressly stipulated "that the proceeds of the sale shall remain in the hands of the sheriff subject

SEIZURE—Continued.

to the claims, rights, liens and privileges of the seizing creditors." Whatever may have been his legal rights, the agreement became the law to him. *State ex rel. Moss & Co. vs. Judge*, p. 203.

SEPARATION OF PROPERTY.

The wife's right to a separation of property is not limited to cases where she has actual claims against her husband which are endangered, but extends also to the case in which his circumstances require it, in order that she may enjoy the fruits of her separate industry for the support of herself and family without liability to her husband's creditors.

Brown & Learned vs. Smythe et al., p. 325.

SEQUESTRATION.

In sequestration of movable property based on a vendor's privilege, an affidavit to the debt, to the privilege, and to the fear that "the defendant will conceal, part with or dispose of the movable in his possession during the pendency of the suit," fills all the requirements of the law; and the party is not bound to swear to, or to prove, any other grounds of fear than the simple facts that he has a privilege and that it lies in the power of the defendant to defeat or destroy it by doing some of the acts which he swears he fears he may do.

The case is still stronger where the purchaser of the movable has failed to pay the price when due; which default would be a sufficient reason for the fear, even if the law required the creditor to swear and to prove that he has *good cause* to fear, which it does not.

Lowden vs. Robertson, Jr., p. 825.

SERVITUDE.

Prescription does not run against the exercise of a servitude of drainage established by a police jury in pursuance of Section 6 of the Act of 25th of February, 1813, on Bonnet Carre point and adjacent lands, in favor of one of the proprietors of an estate included in the system ordained, who participated in its establishment and afterwards resisted and prevented its repair and improvement.

A servitude having been established under the police power, conferred by that statute, its control continues to reside in the police jury; neither party to it can prevent or oppose its repair or improvement; no individual can go, at his pleasure, on the premises or estate of another and make repairs on or improvements of such servitude he may deem necessary; and such repairs or improvements can be made in pursuance of the authority and ordinances of the police jury only. *Sarpy et al. vs. Hymel et al.*, p. 425.

SHERIFF.

The sheriff is responsible to the injured party for all damages occasioned through his negligence, malfeasance or misconduct, or that of his deputies.

The party who obtains an attachment of his debtor's property, and realizes nothing thereby, because a second writ obtained against the same property is designedly executed in advance of his, by a deputy sheriff with full knowledge of the facts, is entitled to recover damages against the sheriff.

The measure of such damages is not the amount of his claim, if it exceeds the value of the debtor's property which the injured party intended to reach; but he cannot recover more than he would have received if the officer had done his duty.

Grabenheimer vs. Budd, sheriff, et als., p. 107.

SLANDER.

Under the law of Louisiana slander is a *quasi* offense, actionable under the broad provision of the Code: "Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it.

If the words are false, injurious and uttered *malo animo* they are actionable.

Both malice and injury may be inferred from the nature and falsity of the words.

Under the existing social habits, customs and prejudices, considered simply as facts, charging a white man with being a negro, is calculated to inflict injury and damage to the knowledge of all persons, and no one can so make and circulate such a charge without knowing its injurious effect and intending to injure if he knew that the charge was false. Such charge was recognized as actionable slander by this Court under the Constitution of 1868.

21 Ann. 308.

Spotorno vs. Fourichon, p. 823.

STATUTES.

A suit brought under Act 106 of 1886—it being an act to encourage, protect, regulate and develop the oyster industry in this State—is necessarily predicated on apparent title and possession as owner of the lands acquired from the State or United States government prior to the passage of the act, by the claimant of the *exclusive* right to use the bayous, lakes, etc., which make into or run through them, for the purpose of *planting* oysters and other shell fish. The terms of said act do not include them within its designation of common property.

STATUTES—*Continued.*

If the salt water ascertained to be in a bayou, lake, cove, or inlet adjacent to, or connected with, an arm of the Gulf of Mexico, does not result from an overflow that is occasioned by high tides flooding its banks; but, in the first instance, enters an arm of the gulf, and thence passes into said bayou, lake, etc., and is there combined with fresh water derived from other sources, same cannot be considered as an arm of the sea, nor its banks the seashore.

All that tract of land over which the greatest water-flood extends *itself* is the seashore.

"High seas" mean that portion of the sea which washes the *open coast*, and do not include the combined salt and fresh waters which at high tide flood the banks of an adjacent bay, bayou or lake.

Morgan vs. Nagodish et als., p. 240.

In the absence of clear proof of dedication to public use, or of formal assent by the owner, from which the same can be inferred, a road used by the public by the tolerance of the latter for thirty years and even longer, will not be declared a public road.

Section 3608, R. S., which incorporates an act of 1818, defining what roads are public, should be construed with Art. R. C. C. 455, which declares that the use of the banks of *navigable* rivers or streams is *public*.

In the instant case, the bayou on which it is claimed that the lands of the defendant front, is not a navigable stream and the road in question is not public.

McCearley vs. Lemennier, p. 253.

SUCCESSION.

The law makes it the imperative duty of administrators of successions to see to and provide for the payment of succession debts, and, when necessary, to provoke the sale of the property, movable and immovable, for that purpose.

This duty cannot be paralyzed by the mere judicial denial by an heir that the debts acknowledged by the administrator are truly due.

In order to restrain the execution of an order of sale provoked to pay debts, an heir must not merely allege, but prove that the debts do not exist.

The law does not forbid the sale of succession property in the summer time, and the probate judge having, in the exercise of his discretion ordered the sale, we have no authority, on such ground, to interfere.

Lehman, Abraham & Co. vs. Worley, administrator, p. 620.

In case a deceased person leaves amongst his assets a plantation on

SUCCESSION—Continued.

which there is a *growing crop at the time of his death*, his heirs may prosecute the cultivation thereof and incur the necessary expense therefor, as an act of legitimate administration.

Once an administrator is appointed to said succession, he may continue the said planting operations, if conducted with the skill and care of a prudent owner, and the necessary costs of same is a proper charge against the estate and may be paid out of the proceeds of the crop.

If such venture proves successful and a profit is realized, neither an heir nor creditor can take the proceeds of the crop as an asset of the estate, and at the same time reject and disallow the cost and expense of production. *Succession of Worley, p. 622.*

Although prescription be suspended against the creditors of an insolvent, the principle is inapplicable to successions, whether solvent or insolvent. *Succession of Gagneaux, p. 701.*

Complaint made of an order of court directing the sale of property to pay the debts of a succession, alleged not to be due, after the sale is perfected, and in a suit to which the administrator is not a party, do not go to the court's want of jurisdiction, and to avail, same must be seasonably urged, else they will be barred.

A purchaser at a probate sale, made under an order of the court, to pay debts of a succession that are stated on a tableau therein filed, is not bound to look beyond the decree recognizing the necessity therefor. *Linman et al. vs. Riggins, p. 761.*

An administrator is entitled to credit for moneys paid out for the repair or preservation of plantation buildings and machinery, also for insurance on gin-house, though the policy issued in the name of the factor or commission merchant for the estate.

A daughter of the intestate, who occupies with her minor children a plantation dwelling-house, should not be charged rent, where she has not contracted to do so, and where the building is not needed for the administrator or a tenant and is not required for the cultivation of the plantation.

Where an administrator has conducted planting operations and a mercantile business on account of the succession, and two of the three legal heirs have agreed that their shares in the succession shall be responsible for the debts contracted by the administrator for this unauthorized cultivation of the succession plantation they do not bind themselves personally for the debts, nor are their shares liable for more than a third of the debts. Nor are the heirs com-

SUCCESSION—*Continued.*

mitted by such agreement to correctness of the account and estopped from disputing it. Nor will a judgment decreeing the liability of such shares for the debt be held as *res judicata* against their right to dispute it, or show its payment or extinguishment.

Where the administrator has employed competent and experienced attorneys, who are fully capable alone to perform every service required of them pertaining to the regular and usual administration of the succession, he is not authorized to employ at the expense of the succession other attorneys, whose services are directed mainly to the enforcement of a large claim against the succession in favor of a firm of which the administrator is a member. Their fee is not a proper charge against the succession.

The entire commissions of an administrator of a large succession are not properly exigible before the administration is terminated. Prior to this his commissions on sums received and distributed should be paid, and his rights as to the residue reserved for his final account. He is entitled to commissions on the rentals of the plantation, though leased by himself.

Succession of Sparrow, p. 484.

An order of court for the sale of succession property, which is not justified by the face of the papers, is illegal and can be successfully resisted by an adjudicatee refusing compliance with his bid on property offered for sale.

An adjudicatee cannot be compelled to accept a title tendered under such circumstances, and has a right to demand reimbursement of the cash paid by him to the auctioneer at the moment of adjudication.

Succession of Dumestre, p. 572.

Henderson, a creditor of a succession has a right to require the administration thereof, to be conducted according to law, and to that end, to require that all its property shall be included in the inventory, and to prevent improper and illegal sales thereof. He is not bound in order to maintain such action, to allege or prove the insolvency of the succession. Its solvency or insolvency on the result of the administration, on the value of its property and amount of debts which may be presented against it; and the creditor is not bound and has not the means to solve this question in advance.

Our jurisdiction in such a case is governed by the amount of the fund to be distributed.

LeBauf vs. Webre, et als., p. 380.

SUCCESSION—Continued.

The collateral attack by simple heirs on the validity of a judgment of separation of property between a deceased husband and a surviving wife, must be restricted within the same limits which would circumscribe an attack made by the husband himself, if he were alive.

Creditors and forced heirs alone, in a collateral manner, justify an inquiry into the validity of such judgments on their merits.

Simple heirs at law, derive their rights from the husband or wife, as the case may be, and can institute no attack and no inquiry which would not be opened to the deceased, under whom they claim, if he or she were alive.

In such a case the inquiry must be restricted to an examination to ascertain whether the court which rendered the judgment had jurisdiction, and whether it exercised that jurisdiction according to the forms of proceeding established by law.

To create a community sought to be dissolved at the instance of the wife, there must be a lawful marriage, but it is immaterial whether the particular marriage declared upon be valid or not, provided it be shown that there was a lawful marriage between the parties.

Succession of Déjan, p. 437.

The State claimed the succession of a person who had died unmarried, leaving no known ascendants or descendants, or collateral relations, adversely to a universal legatee in possession of the estate, on the ground of the alleged incapacity and unworthiness of the legatee, whereupon an intervention was filed by third persons claiming the succession as heirs at law of the deceased; who contended that under the issues thus involved, the burden of evidence was on the State to prove that the deceased had left no heirs possibly entitled to the succession, in default of which proof the State had no interest to resist the claim of the intervenors.

Held, by the court, that the burden of evidence was on intervenors who sought to recover as heirs to prove their heirship with legal certainty, in default of which they have no standing in court to regulate the disposition of the succession property. In an alleged vacant succession the State has an interest to defeat the pretensions of parties claiming to be heirs of the deceased. The mode of proving that a person known at a certain time and place as A, was the identical person subsequently known at another place under the name of B, by showing resemblance between A and pictures taken of B, is very unreliable and absolutely unsatisfactory.

Succession of Kate Townsend, p. 66.

SUCCESSION—*Continued.*

The Act of 1870, No. 87, does not authorize the appointment of the public administrator to the succession of a party dying intestate, where the heirs of the deceased are present or represented, and are in possession of the property left by him.

The circumstance that the succession is that of a resident of another State, composed of personal property, which by the law of the domicile vests in the administrator there, does not justify the appointment here, where the heirs oppose it.

The nature or title of such heirs and administrator is of no concern to the public administrator. *Succession of Smith*, p. 105.

Where a person dies leaving no descendants or ascendants, but a brother and children of a pre-deceased brother, the latter are called to the succession of their uncle by representation, the children representing their pre-deceased father; but, though thus representing their father, they do not derive their right to inherit from him, but from the law. Such right is not impaired or affected by any act of their father. Therefore, they are not estopped from prosecuting a right of action derived from the succession of their uncle, on account of acts or omissions of their father, although these acts or omissions might have estopped him (the father) had he survived the intestate from maintaining the action. Reaffirming 4 N. S. 557; 23 Ann. 290; 33 Ann. 1001.

McKenzie et al. vs. Bason et als., p. 158.

When the husband and survivor of the community dies without having administered the succession of his pre-deceased wife, of which he had the usufruct, his heirs being also the heirs of his wife, the two successions may be settled and distributed among the heirs in *his* succession alone.

The administration of the succession of the deceased husband necessarily involves with it the administration of the community.

It is only after the heir has been called on by the creditors of the succession to renounce or to take the inheritance, and he asks time to deliberate, that an administrator can be appointed.

The heir who accepts a succession, with the benefit of an inventory, is placed *nearly* on the same footing with curators of vacant estates. His engagement is to administrator *as beneficiary heir*.

The result of the whole legislation on the subject is that the heir who accepts, with the benefit of inventory, may institute suits touching the succession without making himself unconditionally liable for his ancestor's debts.

SUCCESSION—Continued.

He may even institute suits that are conservatory in their character before he either accepts or rejects, provide he claim time for deliberation and make proper reservation, without assuming the capacity of a simple heir. *Succession of Lamm, p. 312.*

SURETYSHIP.

When the principal and sureties on an official bond are sued together, the judgment as to the principal is *res adjudicata* as to the sureties, and within the limit of the amounts for which they are held under the terms of their bond, they are bound to make good the entire judgment against the principal, including the penalty.

Easton and Breaur vs. Board of School Directors, p. 705.

Several individuals enter into an agreement to become the sureties *in solido* of another, on the following terms, viz: Their principal was to purchase from a third person a quantity of land which he was to buy from the United States government at \$1.25 per acre, and which was to aggregate in value a stipulated sum, and whereupon a special mortgage and vendor's lien was to be retained as a security therefor.

Their principal's vendor was to give his consent thereto, and on this condition the securities signed a note in his favor.

Such third person, as payee of this note, purchased land of the government, but not for the aggregate amount specified; but he sold it to their principal for that amount.

Held: That proof of these averments does not establish a want of consideration, in the absence of proof that the land conveyed was worth less than the price it sold for.

Barbe vs. Hansen et als., p. 707.

The acceptance of the surety on a twelve months' bond of the assumption of a third person to hold him harmless, does not deprive him of his recourse against the principal of the bond or the property for the price of which the bond was given, when the assumption is not discharged and the surety has paid the bond.

Hancock vs. Halbrook et als., p. 54.

Sureties for the fidelity of an officer appointed for a limited term are not liable for his defaults beyond the term of the appointment or commission under which the bond was furnished.

Provisions of law authorizing officers to hold over until their successors are appointed and qualified, can only extend the liability of the sureties for such reasonable time as, with due diligence, would enable the successor to be appointed and qualified.

State vs. Powell et als., p. 241.

SYNDIC.

The duties of a provisional syndic consist in keeping, as a deposit, all the effects of an insolvent debtor, in performing all conservatory acts which may be necessary in demanding and receiving rents, and income of the property, in collecting all claims which may become due during his administration, and in accounting to the definite syndic as soon as he is appointed.

He is not authorized to disburse funds which shall come into his hands. In case no inventory is made of the effects surrendered, but only an estimation is made of their value, and a provisional syndic is placed in possession, and subsequently, a definite syndic is elected, and he causes an inventory to be made which discloses an apparent deficit in quantity: *Held*, that in the absence of some direct evidence that the provisional syndic has disposed of, or misappropriated them, he cannot be made responsible for the difference.

Pitcher & Co. vs. Their Creditors, p. 782.

TAXATION.

The amendment of Art. 207 of the Constitution of 1879 which exempts from taxation and license manufacturers of ice, fertilizers and chemicals, is not retroactive and does not exempt them from taxes and licenses due prior to the adoption of the amendment.

State ex rel. Stern's Manf. Co. vs. City of New Orleans et al., p. 697.

The word "may," found in Section 54 of Act No. 81 of 1888, does not mean *shall*. Traced back, through the last sentence of Article 229 of the Constitution to Act No. 23, Section 28, of 1877, which the framers of that instrument intended to continue in force in that respect, it simply means *are authorized*.

The Constitution merely directed that the legislature "shall provide that every parish *may* levy a tax, which means *is authorized or empowered*."

Any legislation seeming to impose upon police juries the *duty* or *obligation* of levying the tax would transcend the delegated authority and so be unconstitutional and barren of effect.

Police jurors are therefore clothed by law with the discretionary or optional power of levying or not, as in their wisdom they may see fit and proper, the tax in question for school purposes.

In case of a failure to levy the tax, no *mandamus* can issue to compel the levy. *State ex rel. School Directors vs. Police Jury*, p. 755.

While we are bound to take judicial cognizance of the principles of the common law as it prevails in other States, this is not true of the statutes of such States, which will be presumed to be just the same as our own in the absence of proof to the contrary.

TAXATION—Continued.

It will likewise be presumed, in the absence of contrary proof, that taxes assessed under and in pursuance of the laws of Tennessee, are secured by liens and privileges as are taxes assessed under our own laws. *Sandidge vs. Hunt*, p. 766.

A clear distinction exists in law as well as in fact, and must be observed by courts, between the business of an *insurance agent* and that of a person, firm or corporation *conducting or doing an insurance business*.

In the contracts of insurance negotiated by insurance agents the latter act only in a representative capacity, as intermediaries between the *insured* and the companies which they represent; in such contracts they do not own the premiums which they receive; they are not the *insurers*, hence never personally liable for losses.

Therefore they are not personally liable for licenses exacted by law of persons, firms or corporations who do and conduct an insurance business in this State.

A suit to enforce such a license against the agents personally cannot be maintained. *State vs. Woods et al.*, p. 175.

Goods sent from one State to another are not lawful objects of taxation while they are in *transit* between the place of origin and the place of destination.

Goods thus sent cease to be in *transit* and can be subjected to taxation the moment they reach their place of destination and are there offered for sale, provided they are taxed as other goods are and not by reason of their being brought into the State from another State and are not subjected to any favorable discrimination.

It is immaterial whether they are unloaded or not, or were not consigned to any specially authorized agent within the State of destination. It is enough that they were in the charge and custody of one who had the power to sell, who disposed of the same in part and is ready to do so for the rest.

Taxation in such cases, in the absence of contrary congressional legislation, does not violate Art. 1, Sec. 8, Clause 3; Art. 1, Sec. 10, Clause 2, or Art. 4, Sec. 2, Clause 1, of the Constitution of the United States.

Pittsburg and Southern Coal Company vs. Bates, sheriff, etc., p. 226.

Art. 214 of the Constitution of the State of Louisiana is self-acting, in so far as it confers directly upon the levee commissioner, authority to levy a tax of five mills for levee purposes, in their respective districts.

TAXATION—Continued.

The only legislative action contemplated under 214 of the Constitution is the division of the State into levee districts and to provide for the appointment or election of levee commissioners.

Davis vs. Green, tax collector, et als., p. 281.

Section 1 of Act 172 of 1852 exempts from the payment of parish taxes all objects of parish taxation—whether property or occupation—and whether denominated taxes or licenses.

A license, fee or exaction—whatever name or designation is given it—when plainly imposed for the sole, or main purpose of revenue, is, in effect, a *tax*.

The “town of Jackson” includes the inhabitants as well as the property of that corporation. *Parish of East Feliciana vs. Levy, p. 332.*

The very object of Art. 206 of the Constitution was to remove license taxation from the operation of Art. 203 requiring all taxation to be equal and uniform, and to authorize, require license-taxation to be graduated.

The term “graduate” is a word of elastic meaning involving infinite variety in the methods and standard of graduation which may be adopted.

The Constitution simply requiring the General Assembly to *graduate* license taxes without indicating any particular method or standard of graduation, has devolved on the Assembly the function of determining what methods shall be adopted.

A law which divides insurance companies into several classes according to the amount of premiums received, and imposes on each class a different license-tax, greater upon those receiving a larger amount of premiums than on those receiving less, complies with the requirement of graduation.

The charge that smaller companies pay a larger tax in proportion to their premiums than the larger companies, may impugn the justice, but not the constitutionality of the law, the constitution not declaring that the graduation shall be in exact proportion to the business done.

A foreign corporation is not *required* by the Constitution to be licensed by a different mode from that provided for home corporations. The Constitution is not imperative, but simply permissive of such mode. Such corporation cannot complain that the license claimed is based on the system adopted for home organizations.

State vs. Liverpool, London and Globe Insurance Co., p. 463.

TAXES.

The provision in the present State Constitution directing the collection of taxes otherwise than by suit, was not self-operative; hence, a suit for a city tax instituted and prosecuted before the legislative act was passed to carry into effect the said provision, operated to interrupt prescription against the tax. *City vs. Wood & Bro.*, re affirmed, 34 Ann. 732.

An assessment on merchandise or money at interest does not, though duly recorded, operate as a privilege on the immovables of the tax payers under Act 77 of 1880. See Section 24 of said act.

Act 95 of 1882, fixing the term of prescriptions against tax mortgages and privileges at five years, does not contravene Art. 176 of the Constitution; nor does the provision in that article, as to the time within which privileges shall be recorded, apply to tax privileges.

Saloy vs. Woods, p. 585.

TAX LICENSES.

Operating a street railroad by horse and steam is a *business* within the meaning of the law which can be subjected to the payment of a license, under Act 101 of 1886 and City Ordinance 2035.

A contract conferring the right to lay rails to operate a street railway, without dispensing from the payment of a license, is not impaired by the exaction of such license.

City of New Orleans vs. Railroad Co., p. 587.

TAX SALES.

Section 3 of Act 82 of 1884, which declares that a tax title executed before a notary shall be conclusive evidence of the following facts:

- 1st. That the property was assessed according to law;
- 2d. That the taxes were levied according to law;
- 3d. That the property was advertised according to law;
- 4th. That the property was adjudicated and sold, as recited in said deed;
- 5th. That all the prerequisites of the law were complied with by all the officers, from the assessment up to and including the execution, and registry of the deed to said purchaser,—was only intended to conclude enquiry into the *non-essential* requisites to the exercise of taxing power.

The provisions of that section necessarily imply that all the jurisdictional prerequisites have been complied with; and if, in point of fact, they have not, the tax title does not preclude an action of nullity based on *non-compliance* therewith.

The Legislature had ample power to enact such a statute, and the act

TAX SALES—*Continued.*

in question is not open to the objection of unconstitutionality urged against it.

In the Matter of Orloff Lake, Praying for a writ of Possession Under a Tax Title, and the Third Opposition and Injunction of John Leslie, p. 142.

A tax sale under an assessment for taxes of 1868, in the name of a deceased person to whom the property did not belong at the time, is without effect and no judgment subsequently rendered on motion can impart any validity to such sale. The law in force then required the assessment to be made in the name of the actual owner.

Kearns, curator, vs. Uollins, p. 453.

Where property has been sold for taxes, and the taxpayer redeems it within the term allowed therefor, the one who lends him the money to enable him to redeem it does not thereby become invested with title to the property, although the act acknowledging the loan contains an express subrogation of the lender to his (the taxpayer's) rights. The title is in the purchaser at the tax sale, and he alone can pass it to another; and when it was redeemed the title reverted to the original owner, and could be made liable for his debts. *Gambon vs. Lapene, Oallier, third opponent, p. 557.*

USUFRUCT.

The usufruct which the law allows to the surviving spouse, over the share of the deceased in the property of the community, during widowhood, when there exists issue of the marriage, is not defeated by testamentary dispositions of the deceased, bequeathing the disposable portion to the survivor and the usufruct over his undisposed share of the community property.

Such usufruct can be defeated only where the predeceased has, by will, disposed of his share in whole, or in part, *adversely* to the usufruct, so that both, the usufruct and the bequest, cannot co-exist.

Succeesion of Moore, p. 531.

USURY.

It appearing that defendant is the owner of the mortgage notes herein concerned and that he has actually paid the maker the face value thereof less a discount of nine per cent, he is entitled to recover the whole amount thereof, notwithstanding the inclusion of such usurious interest therein, under Art. 2924 Rev. C. C.

Mutual National Bank vs. Reagan et als., p. 17.

WARRANTY.

The transferer of a judgment who sells all his rights to it and to all suits growing out of it, warrants the *existence* of the debt at the time.

If the judgment has been previously extinguished and was not in existence as a claim at the date of the sale, the vendor is bound to restore the price to the purchaser.

Johnson & Co. vs. Beice & Frelson, p. 273.

A suit by an evicted purchaser against his vendor, or against the latter's vendor, for indemnity on account of the breach of the covenant of the warranty, is not a real action. If the suit is brought against the succession of the vendor, the testamentary executor alone is competent to defend the action; hence it is not necessary that absent heirs be made parties.

At common law and under the laws of the State of Texas, an evicted purchaser may sue a remote vendor for recovery of his purchase price, without first exercising his recourse against his immediate vendor. Under that system "a covenant of warranty runs with the land."

In Texas a purchaser may sue his vendor for a breach of the covenant of warranty without showing eviction under legal process, but in that case the purchaser must under proper averments establish the validity of the title which he recognizes as paramount to that transferred to him by his vendor, and must show an actual dispossession by virtue thereof. The rights and obligations of the parties to a sale executed in one State of real estate situated in another, must be determined under the laws of the State in which the property is situated.

Succession of Cassidy, p. 827.

WILLS.

The recital, in a nuncupative will by public act, that the officiating witnesses are *competent*, does not satisfy the exigency of the law, which requires the statement in the act that they are *residents* of the place wherein the will was executed.

The act must, on its face, make full proof of the facts constituting the competency of the witnesses in that respect, and show the observance of all the essential formalities required to be fulfilled.

The notary is not authorized to judge of the competency of the witnesses and dispense himself from stating the facts constituting that competency. He must state those facts and express in what manner the required formalities were fulfilled.

The omission to declare those facts cannot be supplemented and renders the will invalid.

Succession of Vollmer, p. 593.

WILLS—Continued.

The will contained the following clauses:

The money collected from my life insurance "will more than pay every debt I owe on earth, and as I desire, leave my property to my heirs, to be equally divided among them according to the laws of the State of Louisiana.

"I leave to my brother, Dr. J. W. Ball, \$2500, and to my sister, M. J. McK., \$1500, which my executors will pay out of first moneys realized from my estate."

Held, that the insufficiency of the insurance money to pay the debts and the necessity of paying the legacies out of the *property*, furnishes no ground for rejecting the legacies. The expectation and desire expressed in the first clause are entirely subordinated to the command expressed in favor of the special legatees, to whom the testator seems to have desired to give a preference even over creditors by directing their payment out of the *first* moneys realized. Even if the two clauses were contradictory, the last written would prevail under Art. 1723 Rev. Civil Code.

Ball et al. vs. Executors, p. 284.

Esc. J. J.

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